## Applicant Details

| | |
|---|---|
| First Name | **Katherine** |
| Last Name | **McMullen** |
| Citizenship Status | **U. S. Citizen** |
| Email Address | **kmm475@georgetown.edu** |
| Address | **Address**<br>**Street**<br>**455 I Street NW, Apt. 606**<br>**City**<br>**Washington**<br>**State/Territory**<br>**District of Columbia**<br>**Zip**<br>**20001**<br>**Country**<br>**United States** |
| Contact Phone Number | **5408787987** |

## Applicant Education

| | |
|---|---|
| BA/BS From | **Stanford University** |
| Date of BA/BS | **June 2016** |
| JD/LLB From | **Georgetown University Law Center**<br>**https://www.nalplawschools.org/employer_profile?FormID=961** |
| Date of JD/LLB | **June 7, 2023** |
| Class Rank | **School does not rank** |
| Law Review/ Journal | **Yes** |
| Journal(s) | **The Georgetown Journal of Legal Ethics** |
| Moot Court Experience | **Yes** |
| Moot Court Name(s) | **GULC Beaudry Moot Court Competition (2021) - Semifinalist**<br>**Federal Bar Association Thurgood Marshall Moot Court Competition (2022) - top 8 teams** |

## Bar Admission

## Prior Judicial Experience

| | |
|---|---|
| Judicial Internships/ Externships | **Yes** |
| Post-graduate Judicial Law Clerk | **No** |

## Specialized Work Experience

## Recommenders

Satterthwaite, Emily
eas395@georgetown.edu
Keenan, Frances
keenan@abell.org
443-226-1237
Langevoort, Donald
langevdc@law.georgetown.edu

**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

**Katherine McMullen**
455 I Street NW, Apt. 606, Washington, D.C. 20001
(540) 878-7987 | kmm475@georgetown.edu

May 24, 2023

The Honorable Juan R. Sánchez
United States District Court for the Eastern District of Pennsylvania
James A. Byrne United States Courthouse
601 Market Street
Room 14613
Philadelphia, PA 19106

Dear Chief Judge Sánchez:

As an expected June 2023 graduate of Georgetown University Law Center, I would like to be considered for a 2024-2025 clerkship with your chambers in Philadelphia, Pennsylvania. Having gained exposure to litigation through my prior professional experiences and future experience as an incoming litigation associate at Kirkland & Ellis in Washington, D.C., I am very interested in clerking in the Eastern District of Pennsylvania because of the opportunity to observe a docket with vast exposure to government-facing litigation, including a wide-range of criminal prosecutions. I am particularly interested in working for your chambers because of your strategic vantage point in the Third Circuit and your background in criminal defense—the Court must apply its precedents, but I want to learn how those precedents are considered alongside a deep understanding of the inequities that exist within the justice system.

I chose to attend Georgetown to begin my legal career because I wanted to spend my time meeting practitioners and learning how the law is applied practically, outside the classroom. Through internships, including with Judge Kelly at the U.S. District Court for the District of Columbia and Judge Crowell at D.C. Superior Court, I gained exposure to how attorneys operate in the real world, and spent time drafting motions and memoranda, alongside various research assignments to assist both litigators and judicial clerks as they prepared for trial. It is through these experiences that I decided I wanted to clerk—the opportunity to see how the law is decided in action, and the messiness of wrestling with precedent to create the best legal outcome is one I would value extensively.

Prior to coming to law school I also saw litigation up-close—I worked for the Abell Foundation, a nonprofit that had a portfolio investment embroiled in IP litigation in the USITC and district courts. I assisted with research for complaint story-crafting, deposition preparation, and privilege log work, among other trial and settlement documents associated with the litigation. Alongside this work on IP litigation at Abell, I worked for the Chair of the Baltimore County Sexual Assault Reform Task Force. Through this role I interviewed public lab directors across Maryland regarding their practices surrounding sexual assault forensic evidence kits, interfaced with law enforcement, the Baltimore County State's Attorney's Office and other stakeholders, and drafted sections of the final report that was released by the County Executive.

Clerking offers a singular opportunity to further develop my foundational understanding of how the law works in practice, and I am excited to apply for this opportunity with your chambers in Philadelphia. Enclosed please find my resume, list of references, law school transcript, and writing sample. Arriving separately through Oscar are letters of recommendation from Professors Donald Langevoort and Emily Satterthwaite, along with a letter of recommendation from a prior supervisor of mine, Frances (Francie) Keenan of the Abell Foundation. I can be reached at kmm475@georgetown.edu or by phone at +1 (540) 878 7987. I look forward to hearing from you.

Best,

Katherine McMullen

# KATHERINE MCMULLEN

455 I Street NW, Apt. 606, Washington, D.C. 20001 | (540) 878-7987 | kmm475@georgetown.edu

## EDUCATION

**GEORGETOWN UNIVERSITY LAW CENTER** — **Washington, D.C.**
*Juris Doctor* — Expected June 2023
GPA: 3.62
Journal: *The Georgetown Journal of Legal Ethics*
Honors: Business Law Scholar, Cohort Four
Barristers' Council, Appellate Advocacy Division (Moot Court)
Exceptional Pro Bono Pledge Honoree
Activities: Peer Tutor for 1Ls (Civil Procedure) (Fall 2022)
Research Assistant, *The Georgetown Law Journal Annual Review of Criminal Procedure* (Summer 2021)
1L Representative, Corporate & Financial Law Organization (2020-2021)

**STANFORD UNIVERSITY** — **Stanford, CA**
Bachelor of Arts in International Relations — June 2016
Minor: Middle Eastern Languages, Literature & Cultures
Study Abroad Awards: Clinton Scholarship, American University in Dubai, United Arab Emirates (August-December 2014)
USDE Fulbright-Hays Fellowship Grant awarded by the University of Virginia for study at Yarmouk University in Irbid, Jordan (June-August 2014)
Activities: Stanford Women in Business, Board Member (2015-2016) & Other Roles (2012-2015)

## EXPERIENCE

**KIRKLAND & ELLIS** — **Washington, D.C.**
*Incoming Litigation Associate* — Expected Fall 2023
*Summer Associate* — May 2022-July 2022
- Performed legal research, drafted memo on SEC rule, and reviewed documents for FCPA investigation

**U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA** — **Washington, D.C.**
*Judicial Extern, Chambers of the Honorable Timothy J. Kelly* — January 2023-April 2023
- Performed legal research, drafted sections of opinions and drafted bench memo on contract issue

**DEPARTMENT OF JUSTICE** — **Washington, D.C.**
*Volunteer Law Student Extern, Organized Crime and Gang Section* — August 2022-November 2022
- Performed legal research and drafted motions on evidentiary and other issues

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA** — **Washington, D.C.**
*Judicial Extern, Chambers of the Honorable James A. Crowell IV* — January 2022-April 2022
- Performed legal research, assisted with docket preparation, and drafted both sentencing and bench memos, including multiple memos for Incarceration Reduction Amendment Act (IRAA) cases

**U.S. ATTORNEY'S OFFICE, DISTRICT OF COLUMBIA** — **Washington, D.C.**
*Volunteer Law Student Extern, Violent Crimes and Narcotics Section* — September 2021-December 2021
- Performed legal research, redacted discovery documents, and drafted sections of motions

**U.S. ATTORNEY'S OFFICE, DISTRICT OF MARYLAND** — **Baltimore, MD**
*Summer Law Student Intern* — June 2021-July 2021
- Performed legal research, summarized witness testimony for use in appellate brief, and drafted sections of motions

**ABELL FOUNDATION** — **Baltimore, MD**
*Analyst and Executive Assistant to the Senior Vice President* — May 2017-October 2019; March 2020-August 2020
- Provided litigation support, including privilege log analysis, complaint story-crafting and Relativity discovery database research, for portfolio investment involved in intellectual property disputes in USITC and District Court
- Updated various competitor and market analyses for active direct investments, including those in the automotive powertrain, hydropower, and gasification technology spaces, and performed diligence for potential new investments
- Developed and implemented audit of over 200 sexual assault cases in Baltimore County; interviewed stakeholders and drafted sections of report on findings for release by County Executive

**LORI SYSTEMS** — **Nairobi, Kenya**
*Executive Coordinator* — November 2019-March 2020
- Developed pitch decks for use in high-level investor meetings and developed and implemented strategic partnership and internal operations strategies in collaboration with executive team

**PLOUGHSHARES FUND** — **Washington, D.C.**
*Research Assistant* — September 2016-March 2017
- Conducted in-depth nuclear weapons and security research to inform senior staff talking points and co-authored article on weapons transport regarding lack of security protocols during domestic transport of nuclear arms

## COMMUNITY INVOLVEMENT & INTERESTS

- Georgetown University Pre-Law Society Mentor (2021-Present); Thread (thread.org) Head of Family (2017-2019)
- Nonfiction, culinary history, and fitness

**Katherine McMullen List of References:**

Frances (Francie) Keenan
Senior Vice President, Abell Foundation
Supervisor at Abell from 2017-2020.
keenan@abell.org
(410) 547-1300 (office main line)

Hans Miller
Trial Attorney, Organized Crime & Gang Section (OCGS), U.S. Department of Justice
Supervisor at OCGS, Fall 2022.
Hans.Miller@usdoj.gov
202-353-2099 (desk phone)

Professor Eileen Kamerick
Adjunct Professor of Law, Georgetown University Law Center
Professor for Corporate Boards Seminar, Spring 2023.
Eileen.kamerick@gmail.com (preferred)
Eak149@georgetown.edu (alternate)
(847) 846-3200 (cell phone)

**Record of:** Katherine M. McMullen
**GUID:** 819485445

**Course Level:** Juris Doctor

**Entering Program:**
Georgetown University Law Center
Juris Doctor
Major: Law

| Subj | Crs | Sec | Title | Crd | Grd | Pts | R |
|---|---|---|---|---|---|---|---|
| **Fall 2020** | | | | | | | |
| LAWJ | 001 | 22 | Civil Procedure<br>Aderson Francois | 4.00 | A | 16.00 | |
| LAWJ | 002 | 22 | Contracts<br>Anna Gelpern | 4.00 | B+ | 13.32 | |
| LAWJ | 005 | 21 | Legal Practice: Writing and Analysis<br>Erin Carroll | 2.00 | IP | 0.00 | |
| LAWJ | 008 | 21 | Torts<br>Paul Rothstein | 4.00 | B | 12.00 | |

| | EHrs | QHrs | QPts | GPA |
|---|---|---|---|---|
| Current | 12.00 | 12.00 | 41.32 | 3.44 |
| Cumulative | 12.00 | 12.00 | 41.32 | 3.44 |

| Subj | Crs | Sec | Title | Crd | Grd | Pts | R |
|---|---|---|---|---|---|---|---|
| **Spring 2021** | | | | | | | |
| LAWJ | 003 | 22 | Criminal Justice<br>Shon Hopwood | 4.00 | B+ | 13.32 | |
| LAWJ | 004 | 22 | Constitutional Law I: The Federal System<br>Paul Smith | 3.00 | A- | 11.01 | |
| LAWJ | 005 | 21 | Legal Practice: Writing and Analysis<br>Erin Carroll | 4.00 | A- | 14.68 | |
| LAWJ | 007 | 92 | Property<br>Neel Sukhatme | 4.00 | B+ | 13.32 | |
| LAWJ | 1701 | 50 | International Economic Law and Institutions<br>Sean Hagan | 3.00 | A | 12.00 | |
| LAWJ | 611 | 09 | Corporate Compliance in the Financial Sector: Anti-Money Laundering and Counter-Terrorism Financing<br>Jonathan Rusch | 1.00 | P | 0.00 | |

| | EHrs | QHrs | QPts | GPA |
|---|---|---|---|---|
| Current | 19.00 | 18.00 | 64.33 | 3.57 |
| Annual | 31.00 | 30.00 | 105.65 | 3.52 |
| Cumulative | 31.00 | 30.00 | 105.65 | 3.52 |

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**Program Changed to:**
Major: Law/Business Law Scholars

| Subj | Crs | Sec | Title | Crd | Grd | Pts | R |
|---|---|---|---|---|---|---|---|
| **Fall 2021** | | | | | | | |
| LAWJ | 121 | 02 | Corporations<br>Robert Thompson | 4.00 | B+ | 13.32 | |
| LAWJ | 1491 | 03 | Externship I Seminar (J.D. Externship Program)<br>Alexander White | | NG | | |
| LAWJ | 1491 | 125 | ~Seminar<br>Alexander White | 1.00 | A | 4.00 | |
| LAWJ | 1491 | 127 | ~Fieldwork 3cr<br>Alexander White | 3.00 | P | 0.00 | |
| LAWJ | 300 | 05 | Accounting for Lawyers<br>Kevin Woody | 2.00 | B+ | 6.66 | |
| LAWJ | 309 | 07 | Congressional Investigations Seminar<br>Robert Muse | 2.00 | B+ | 6.66 | |
| LAWJ | 421 | 05 | Federal Income Taxation<br>Emily Satterthwaite | 4.00 | A- | 14.68 | |

| | EHrs | QHrs | QPts | GPA |
|---|---|---|---|---|
| Current | 16.00 | 13.00 | 45.32 | 3.49 |
| Cumulative | 47.00 | 43.00 | 150.97 | 3.51 |

| Subj | Crs | Sec | Title | Crd | Grd | Pts | R |
|---|---|---|---|---|---|---|---|
| **Spring 2022** | | | | | | | |
| LAWJ | 126 | 05 | Criminal Law<br>Alicia Washington | 3.00 | A | 12.00 | |
| LAWJ | 1372 | 05 | Business Essentials: A Mini-MBA for Lawyers<br>Stephen Hills | 3.00 | A- | 11.01 | |
| LAWJ | 1492 | 41 | Externship II Seminar (J.D. Externship Program)<br>Tannisha Bell | | NG | | |
| LAWJ | 1492 | 89 | ~Seminar<br>Tannisha Bell | 1.00 | A- | 3.67 | |
| LAWJ | 1492 | 91 | ~Fieldwork<br>Tannisha Bell | 3.00 | P | 0.00 | |
| LAWJ | 1512 | 05 | Constitutional Litigation and the Executive Branch<br>Joshua Matz | 2.00 | A- | 7.34 | |
| LAWJ | 396 | 05 | Securities Regulation<br>Donald Langevoort | 4.00 | A | 16.00 | |

| | EHrs | QHrs | QPts | GPA |
|---|---|---|---|---|
| Current | 16.00 | 13.00 | 50.02 | 3.85 |
| Annual | 32.00 | 26.00 | 95.34 | 3.67 |
| Cumulative | 63.00 | 56.00 | 200.99 | 3.59 |

| Subj | Crs | Sec | Title | Crd | Grd | Pts | R |
|---|---|---|---|---|---|---|---|
| **Fall 2022** | | | | | | | |
| LAWJ | 165 | 05 | Evidence<br>Michael Gottesman | 4.00 | A- | 14.68 | |
| LAWJ | 178 | 07 | Federal Courts and the Federal System<br>Michael Raab | 3.00 | B+ | 9.99 | |
| LAWJ | 361 | 09 | Professional Responsibility<br>Philip Sechler | 2.00 | A | 8.00 | |
| LAWJ | 397 | 05 | Separation of Powers Seminar<br>Paul Clement | 3.00 | B+ | 9.99 | |

----------Continued on Next Page----------

**Record of:** Katherine M. McMullen
**GUID:** 819485445

| | EHrs | QHrs | QPts | GPA |
|---|---|---|---|---|
| Current | 12.00 | 12.00 | 42.66 | 3.56 |
| Cumulative | 75.00 | 68.00 | 243.65 | 3.58 |

| Subj | Crs | Sec | Title | Crd | Grd | Pts | R |
|---|---|---|---|---|---|---|---|
| **Spring 2023** | | | | | | | |
| LAWJ | 114 | 08 | Corporate Finance | 4.00 | P | 0.00 | |
| LAWJ | 1610 | 09 | Criminal Practice Seminar: White-Collar Crimes in a Transnational Context | 2.00 | A- | 7.34 | |
| LAWJ | 1830 | 05 | Corporate Boards Seminar | 2.00 | A | 8.00 | |
| LAWJ | 317 | 07 | Negotiations Seminar | 3.00 | A | 12.00 | |
| LAWJ | 351 | 05 | Trial Practice | 2.00 | A | 8.00 | |

**Transcript Totals**

| | EHrs | QHrs | QPts | GPA |
|---|---|---|---|---|
| Current | 13.00 | 9.00 | 35.34 | 3.93 |
| Annual | 25.00 | 21.00 | 78.00 | 3.71 |
| Cumulative | 88.00 | 77.00 | 278.99 | 3.62 |

**End of Juris Doctor Record**

**Georgetown Law**
600 New Jersey Avenue, NW
Washington, DC 20001

May 24, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am a full-time member of the faculty at Georgetown University Law Center's and it is a pleasure to recommend Ms. Katherine McMullen, Georgetown Law '23, who has applied for a clerkship in your chambers. An active and engaged Georgetown student, Ms. McMullen is a member of the Moot Court team (Barrister's Council, Appellate Advocacy Division) and serves on the Georgetown Journal of Legal Ethics. I am confident that Ms. McMullen will be a wonderful law clerk and am delighted to support her application.

I got to know Ms. McMullen in the fall semester of 2021 when she was a 2L student in my upper-level Federal Income Taxation course. Ms. McMullen's performance in Federal Income Taxation was very strong: she earned an A- and was in the top half of the class. In class, she stood out from the beginning because she sat in the front row, was always meticulously prepared, and her performance on panel was stellar. When she wasn't on panel, she occasionally asked questions and their substantive quality was excellent. They were always on-point, well-articulated, and helped advance everyone's learning, thereby giving Ms. McMullen a well-deserved reputation in the class as a talented legal thinker and communicator.

Ms. McMullen also came to my attention on account of her initiative and the strength of her research and writing. In Federal Income Tax, students were permitted to choose a tax question of interest to them that we had not covered in the course and to write a short memorandum addressing it (for extra credit). Ms. McMullen seized the opportunity to do this and her memorandum was one of the strongest in the class. It asked the following: "How does the IRS treat filing for polygamous and other non-dyadic marriages (e.g., polyamorous relationships) in light of the recent decriminalization of polygamy in Utah and loosening of dyadic-centric domestic partnership requirements in certain domestic municipalities?" The answer provided in the memorandum was clear, thoroughly-researched and well-reasoned. It found that, unless such relationships are recognized as a "marriage" under state law, the IRS cannot treat the individual parties to the relationship as married for tax purposes. She concluded that until the Internal Revenue Code adopts a more expansive definition of what it means to be "married" under section 7701 and corresponding regulations, any given two members of a non-dyadic domestic partnership will be denied the benefits that a married couple can receive under the Internal Revenue Code, thus creating an inequity between these different kinds of legal relationships.

Ms. McMullen's background both before and during law school is impressive and well-suited to clerking. After completing her undergraduate studies at Stanford University and working for several years abroad and domestically, Ms. McMullen came to Georgetown Law. She was selected as a Business Law Scholar on account of her interest in studying business law through a litigation lens; she hopes one day to become a prosecutor. During law school, to advance this core interest, she has engaged a wide array of litigation experiences through externships and internships. These include placements in a judicial externship at the U.S. District Court for the District of Columbia (chambers of the Honorable Timothy J. Kelly), a volunteer law student externship at the Department of Justice (Organized Crime and Gang Section), a judicial externship at the Superior Court for the District of Columbia (chambers of the Honorable James A. Crowell IV), a volunteer law student externship at the U.S. Attorney's Office - District of Columbia (Violent Crimes and Narcotics Section), and a summer law student internship at the U.S. Attorney's Office - District of Maryland.

In addition to Ms. McMullen's academic skills and preparation, she is a kind and curious person. It is always a pleasure to interact with her inside and outside of class. In this regard, she is quick to use her many skills to help others. One example of this is her volunteer work with the organization Thread.org as a "Head of Family" to an at-risk Baltimore ninth grader.

In sum, Ms. McMullen is extremely well-qualified to be a clerk in your chambers and would be a marvelous addition to your community. Her combination of excellent analytical, research, and writing skills along with her interpersonal abilities make it easy for me to enthusiastically recommend her.

I would be happy to discuss further any aspect of this letter or Ms. McMullen's application. Please do not hesitate to contact me if I can be of assistance.

Sincerely yours,

Emily Satterthwaite

Emily Satterthwaite - eas395@georgetown.edu

ABELL
FOUNDATION

May 15, 2023

Dear Judge:

It is my pleasure to submit this letter of recommendation in support of Katherine McMullen's application for a federal clerkship. Katherine worked directly for me at the Abell Foundation for two and one-half years before attending law school

For over 35 years, I have served as the Chief Financial Officer and Senior Vice President for the Abell Foundation, a non-profit private foundation in Baltimore, Maryland, that is dedicated to fighting urban poverty. In addition, for the last 17 years I have served as the Executive Chairman of Paice LLC, a pioneer in hybrid car technology and an Abell investee.

Abell is a very innovative non-profit on multiple fronts: grant-making, social entrepreneurship and investments. Abell invests in promising local companies – including those focused on medical, technical and environmental advances – with the goal of creating local jobs and reinvesting any earnings back into the community. Consistent with this mission, Abell invested millions of dollars to promote Paice LLC's efforts to develop and promote its innovative-patented hybrid car technology. Abell has also made substantial investments in ThermoChem Recovery International (TRI). TRI's advanced steam reforming gasification technology can transform garbage into drop-in transportation fuel. Katherine worked side by side with me on both Paice and TRI during her time at Abell. Her responsibilities included assisting me in managing complex patent litigation between Paice/Abell and several global automotive manufacturers. She routinely interfaced with the patent lawyers and was a key team player during a very stressful and high stakes trial. Katherine earned the complete respect of the trial team. On TRI, Katherine assisted me with review and analysis of an offering memorandum for green bonds, the Independent Engineer's report and consultants' reports describing the first of a kind Municipal Solid Waste (MSW) to jet-fuel bio refinery.

Katherine has a rare gift of being able to immerse herself in the details but then step back to organize, analyze and present complicated information in a well-written form that is concise, persuasive and understandable. Her intellectual abilities along with her professionalism and maturity prompted me to include her in numerous high-level strategy meetings as well as Paice and TRI board meetings. She took on a wide variety of demanding and complex assignments and completed them in an exemplary manner. Her ability to keep confidential matters confidential was exemplary.

111 South Calvert Street Suite 2300
Baltimore, Maryland 21202-6174
Phone 410-547-1300
Fax No. 410-539-6579

Katherine has a thirst for knowledge and a passion for research that allow her to gain an in-depth understanding of complex matters. In addition to the key research she did for Paice and TRI, she co-authored an Abell Report titled "Fact Check: A Survey of Available Data on Juvenile Crime in Baltimore City." Katherine performed data analysis and conducted many in-person and phone interviews with stakeholders (a judge, academics, Office of the Public Defender, Department of Juvenile Services and the State's Attorney's Office). She also learned how to use and analyze a SQL database as part of this project. The report can be found on Abell's website and is an excellent example of the caliber of Katherine's work product.

Katherine works well in environments surrounded by smart people trying to figure out difficult problems. She handles ambiguity well and thrives in an environment that is constantly changing. Katherine prefers to learn by interning/doing rather than the classroom which is why, in part, she decided to attend Georgetown Law School.

Katherine has informed me that she would like to work for a private law firm for a few years, then clerk, and then switch into a public sector role, preferably with a federal prosecuting office. A clerkship would allow her the opportunity to wrestle with and learn how to apply the law each day for a dedicated year while further developing her writing skills. She believes that working for a judge to understand how the judge makes the "tough calls" in legal grey areas and weighs sentencing decisions while working with a small team is truly exciting.

Katherine is an amazing young woman and I truly believe a federal clerkship would complement her skillsets and contribute meaningfully to her continued professional growth and career development.

Frances M. Keenan

Frances M. Keenan
Senior Vice-President
Abell Foundation, Inc.

**Georgetown Law**
600 New Jersey Avenue, NW
Washington, DC 20001

May 24, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

Katherine McMullen has asked that I write to you in connection with her application for a judicial clerkship. Katherine was a student in my Securities Regulation class during her second year at Georgetown, and although the class was very large, I got to know her very well. Based on that contact and her stellar performance on the final exam, I recommend her to you with enthusiasm.

Katherine is a very focused, engaged law student, especially on matters relating to Her career interest, white-collar crime prosecution and litigation. She was selected to take part in Georgetown's innovative Business Law Scholars program, which adds various enhancements to a demanding business law curriculum. She has done internship/externship programs with the Department of Justice, judges in the District of Columbia and D.C. Superior Court, and U.S. Attorney's Offices in the District of Columbia and District of Maryland. She is exceptionally motivated, entirely in a good way. Her summer clerkship was with Kirkland & Ellis in its Washington D.C. office, which she will be joining full time as an associate after her Georgetown graduation.

I urge you to offer her an interview, so that you can observe for yourself Katherine's level of passion and knowledge. Wisely, she is committed to a district court clerkship for the professional skill building it would offer. Were you to hire Katherine as one of your clerks, you will quickly come to realize what an exceptional young professional she is. Please let me know if I can be of any further assistance.

Sincerely,

Donald C. Langevoort
Thomas Aquinas Reynolds Professor of Law

Donald Langevoort - langevdc@law.georgetown.edu

# KATHERINE MCMULLEN

455 I Street NW, Apt. 606, Washington, D.C. 20001 | (540) 878-7987 | kmm475@georgetown.edu


## Writing Sample

The attached writing sample is the argument section of a brief I wrote when competing in the Beaudry Moot Court Competition at Georgetown University Law Center in 2021. The two questions discussed in the brief were: whether the legislative prayer doctrine applies to Hotung School District's school board meetings, and whether the prayer policy of that school district violates the Establishment Clause. The case took place on appeal from a hypothetical Thirteenth Circuit. The competition used a closed packet, and as part of the closed packet, certain reporter numbers and case names were modified. Thus, case names, reporter and page numbers may not correspond exactly to their real-life counterparts. The paper has not been edited by third parties and is my own work product.

## SUMMARY OF ARGUMENT

The Hotung School District Board of Education's 2011 policy of solemnization of proceedings through an invocation falls under the Legislative Prayer Doctrine Exception to the Establishment Clause. The Establishment Clause of the First Amendment to the Constitution prohibits any government policy that effectively forces religion or religious practice onto its citizens. There is generally a clear line separating religious and state practice, with school-sponsored prayer almost universally illegal. There is a narrow exception, however, for invocations that begin sessions of legislative bodies. The exception exists largely because of the historical tradition of solemnizing proceedings through prayer, with case law including school boards within legislative bodies. Therefore, the Thirteenth Circuit correctly decided on appeal that Hotung's policy falls within the narrow legislative prayer exception because the Hotung Board centered its policy on solemnization, and historical tradition allows for such conduct.

Though the Board's conduct rightly falls within the legislative prayer exception, even if this Court disagrees, Hotung's policy survives scrutiny under the Establishment Clause analysis developed in *Lemon v. Kurtzman*. The analysis looks at a policy's purpose, primary effect, and whether or not it is an excessive entanglement of the government with religion. Hotung's express purpose for the policy was solemnization of school board meetings and promotion of the religious diversity of the district. Because of its secular purpose and dedication to removing the Board from direct decision-making regarding the content and provider of the invocation, the primary effect of the policy does not advance religion. In the same vein, because the Hotung Board has removed itself from direct control over the invocation, it has removed its policy from danger of excessive entanglement with religion.

## ARGUMENT

### I. The legislative prayer doctrine applies to the Hotung School District Board of Education's policy of community-sourced religious leaders conducting invocations at its meetings.

#### *A. This case is a question of legislative body invocation—rather than of school prayer—because of the nature of the work of the Hotung Board and historical tradition governing similar practice.*

"A single factual difference… can serve to entangle or free a particular governmental practice from the reach of the [Establishment] Clause's constitutional prohibition… The issue of prayer at school board meetings is no different." *Coles ex rel. Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 376 (6th Cir. 1999). School-sponsored prayer is a per se violation of the Establishment Clause. *Lee v. Weisman*, 505 U.S. 577 (1992) (finding religious exercises conducted at a public high school graduation ceremony are school prayer and thus violate the Establishment Clause). However, the practice of solemnization of a meeting of a legislative body with a religion-adjacent moment is a narrow exception to the general Establishment Clause doctrine. *Marsh v. Chambers*, 463 U.S. 783 (1983) (holding the Nebraska Legislature's practice of opening each legislative session with a prayer by a State-remunerated chaplain does not violate the Establishment Clause); *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565 (2014) (holding *Marsh* applicable to town board meetings). The courts have extended this traditional legislative prayer exception beyond state and federal legislatures, "to local deliberative bodies" like city councils and school boards, though the issue of the exception's applicability to school boards is still fact-sensitive. *Bormuth v. Cnty. of Jackson*, 870 F.3d 494 (6th Cir. 2017) (holding legislative prayer exception extends to local deliberative bodies like city councils); *Am. Humanist Ass'n v. McCarty*, 851 F.3d 521, 527 (5th Cir. 2017) (extends *Town of Greece* to prayers before school boards); *Doe v. Indian River Sch. Dist.*, 653 F.3d 256 (3d Cir. 2011)

(applies *Lee* to issue of school board meeting prayer led by board members); *Coles*, 171 F.3d at 377 (applies *Lee* to issue of school board meeting prayer conducted, at times, in a schoolhouse).

The Third, Fifth and Sixth Circuits have each examined whether prayer performed before school board meetings falls under the legislative prayer doctrine exception. *See, e.g.*, *Coles*, 171 F.3d at 369; *McCarty*, 851 F.3d at 521; *Indian River*, 653 F.3d at 256. In *Coles*, the Sixth Circuit held that prayer before meetings of the Cleveland School Board fell under *Lee* rather than *Town of Greece* because the meetings "are part of the same 'class'" as other activities like school graduation ceremonies and football games "in that they take place on school property and are inextricably intertwined with the public school system[.]" *Coles*, 171 F.3d at 377. Because board meetings are in this same class of activities, the Cleveland Board must be directing the entirety of its meeting's proceedings to its constituencies—the students. *Id.* The Sixth Circuit looked specifically to the audience and setting of the legislative activities of the Cleveland School Board in making the determination that *Lee* should govern the case. The Cleveland School Board conducted meetings on school property—even on occasion within a schoolhouse—which were attended by students who "[were] directly involved in the discussion and debate at school board meetings." *Id.* at 382. By comparison, in the present matter, Hotung's school board holds meetings in the District Administration Building or the local community theater, neither of which is a school. 548 F.4d at 206; 126 F. Supp. 4th at 138. The court in *Lee* noted it was issuing a limited ruling in response to the "sole question" of "whether a religious exercise may be conducted at a graduation ceremony in circumstances where, as we have found, young graduates who object are induced to conform." *Lee*, 505 U.S. at 599. The issue in *Coles*, however, is of a more nuanced nature than the clear bright line ruling of *Lee*. Similarly, the Third Circuit in *Indian River* did not adequately substantiate why *Lee* held sway over the matter. *Indian River*,

653 F.3d at 270 (stating only "[h]aving decided that this case is controlled by the principles in *Lee v. Weisman*, we must next decide whether the Indian River Policy violates the Establishment Clause" without further substantiation). Further, as the Sixth Circuit noted in *Bormuth*, the Fifth Circuit has applied *Town of Greece* to prayers before school boards. *Bormuth*, 870 F.3d at 505 (citing *McCarty*). Therefore, since *Lee* is unconvincingly applicable to the present matter, the fact-sensitive inquiry typified in *Town of Greece* must govern.

### *B. A fact-sensitive inquiry into the Board's policy emphasizes the Board remains squarely within the legislative prayer exception and does not compel its citizens to religious observance.*

Opening meetings of legislative bodies with prayer "is not subject to typical Establishment Clause analysis because such practice 'was accepted by the Framers and has withstood the critical scrutiny of time and political change.'" *McDonough Found.*, 126 F. Supp. 4th at 139 (quoting, in part, *Town of Greece*, 572 U.S. at 577); *Town of Greece*, 572 U.S. at 575 (noting the Court in *Marsh* "sustained legislative prayer without subjecting the practice to any of the formal tests that have traditionally structured this inquiry," because of historical tradition). However, the prayers, or moments of solemnization, must not "denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion." *Town of Greece*, 572 U.S. at 585. The principal audience of the prayers must also be the lawmakers themselves, and not the attending public. *Id.* at 587. In sum, the courts must perform a fact-sensitive inquiry examining the audience, setting, board influence on the prayer giver and prayer content, and historical tradition, in determining whether an organization has violated the legislative prayer doctrine and thus is forcing undue compulsory religious practice on its citizen. *Id.*

#### i. The audience of the Hotung Board's policy is primarily the board members.

The audience for a legislative prayer must be principally the legislatures themselves, rather than a secondary audience, though the secondary audience may be present. *Town of*

*Greece*, 572 U.S. at 587. Special consideration is also given to the presence of children at the proceedings, due to their vulnerability to peer pressure. *Lee*, 505 U.S. at 593; *McDonough Found.*, 548 F.4d at 210. However, as the Circuit Court noted, "the presence of students at board meetings does not transform this into a [*Lee*] school prayer case. There were children present at the town board meetings in *Town of Greece*… [and] the Court nonetheless applied the legislative prayer exception." *McDonough Found.*, 548 F.4d at 210. What is of great importance, however, is the actions of the board itself—if members of the board "directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity," then the policy would likely tip the inquiry against a legislative exception. *Town of Greece*, 572 U.S. at 587. The Hotung Board does no such thing—though there are students present at the meeting, the Board does not force any student into compulsory participation. Further, through the varied nature of speakers at the meetings, the two students who sit in on all Hotung Board meetings as members of the Student Advisory Council are not exposed to a continual march of one religion or prayer-type—they are exposed to the full diversity of offerings in the district, secular and non-secular.

**ii. The setting of the Hotung Board meetings reiterates the separation of religious, school-day and governmental activity.**

The Hotung Board conducts its meetings on non-school property either at a District Administration building or at a local community theater. For these reasons, the meetings are physically and sentimentally removed from the bounds of the school day, thereby providing a clear delineation between what is school and what is not school. Because of this clear line, Hotung satisfies this aspect of the *Town of Greece* inquiry.

**iii. Hotung School Board remains multiple steps removed from the day-to-day selection of prayer giver and prayer content, thereby preventing its slide into school prayer territory.**

The court looks to the activities of the legislative body as a whole when considering legislative prayer. *Lund v. Rowan Cnty., N.C.*, 837 F.3d 407, 421 (4th Cir. 2016). The identity of the prayer or invocation giver is generally "constitutionally insignificant;" rather, what is of significance is whether discrimination against certain speakers preventing their participation has occurred. *Id.* at 424. Further, "[o]nce it invites prayer into the public sphere, government must permit a prayer giver to address his or her own God or gods as conscience dictates, unfettered by what an administrator or judge considers to be nonsectarian." *Town of Greece*, 572 U.S. at 582. Finally, "'[i]f the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion,' a constitutional line can be crossed… To this end, courts need only assure themselves that sectarian legislative prayer, viewed from a cumulative perspective, is not being exploited to proselytize or disparage." *Lund*, 837 F.3d at 421.

When examined holistically, Hotung's policy does not violate this inquiry. The Board's policy removes the Board from directly influencing the content of the prayers. It further removes the Board, in general, from the picking of religious leaders within the community to lead each meeting's invocation. It is only when a religious leader has not sought out the invocation spot at a particular meeting that the Board must name someone to give the invocation, and at that point the policy requires the Board to select a leader from the list at random. Further, the policy prevents religious leaders from speaking at consecutive meetings, thereby eliminating a key path to tipping the scales toward proselytization. The content of the invocations is not used to disparage other religions—though the content of the invocations is beyond the Board's control, the McDonough Foundation has not alleged the contents of the invocations disparage other

religions. Even if McDonough could point to a specific invocation or prayer that did disparage another religion, "*Town of Greece* 'requires an inquiry into the prayer opportunity as a whole, rather than into the contents of a single prayer.'" *Id.* at 422.

**iv. Against the backdrop of historical tradition, Hotung remains firmly within the bounds of the legislative prayer doctrine.**

The Thirteenth Circuit found that dating from the early 1800s—a time when the United States had hardly more than the thirteen original colonies it began with—"at least eight states had some history of opening prayers at school board meetings." *McDonough Found.,* 548 F.4d at 209. In *Bormuth*, the Sixth Circuit found that the "tradition [of legislative prayer] extends not just to state and federal legislatures, but also to local deliberative bodies like city councils" *and* school boards. *Bormuth,* 780 F.3d at 505 (referencing *McCarty,* 851 F.3d 521). Hotung "is a deliberative body, charged with overseeing the district's public schools, adopting budgets, collecting taxes, conducting elections, issuing bonds, and other tasks that are undeniably legislative. In no respect is it less a deliberative body than was the town board in *Town of Greece*." *McDonough Found.,* 548 F.4d at 208–209. Taken together, the Hotung Board is firmly within the legislative prayer doctrine because of the combination of the historically traditional practice of legislative prayer, and its application both to school boards specifically and schools boards by analogy (a legislature is a legislature is a legislature).

## II. Even if this court finds the legislative prayer doctrine does not govern the present matter, the Hotung School Board is not in violation of the Establishment Clause as it satisfies *Lemon*.

### *A. The Lemon test governs as it is the go-to test this Court relies on in cases concerning school prayer.*

To determine whether a matter violates the Establishment Clause, the courts look to *Lemon v. Kurtzman* and the so-called *Lemon* test: "a court must inquire (1) whether the government has the purpose of endorsing religion, (2) whether the effect of the government's

action is to endorse religion, and (3) whether the policy or practice fosters an excessive entanglement between government and religion." *Mellen v. Bunting*, 327 F.3d 355 (4th Cir. 2003) (quoting *Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 592 (1982)). In *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), this court applied the "endorsement test" as opposed to the *Lemon* test. However, the endorsement test and the second prong of the *Lemon* test are virtually indistinguishable. *Indian River*, 653 F.3d at 282 (noting the endorsement test and the second *Lemon* prong are essentially the same, citing to *Black Horse Pike*, 84 F.3d at 1486); *Mellen*, 327 F.3d at 368 (holding the endorsement test is a refinement of *Lemon*'s second prong).

***B. Hotung passes the first prong of the Lemon test because of the Board's policy's clear, secular purpose.***

To apply the first prong of *Lemon*, "we ask 'whether [the] government's actual purpose is to endorse or disapprove of religion.'" *Indian River*, 653 F.3d at 283 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985)). The statute need not have exclusively secular objectives; "the 'touchstone' is neutrality" with the government only violating the Establishment Clause when it "acts with the ostensible and predominant purpose of advancing religion." *Mellen*, 327 F.3d at 742 (quoting *McCreary Cnty. v. ACLU*, 545 U.S. 844, 860 (2005)). The secular purpose must be sincere and not a sham, with the board or government's stated purpose afforded some deference. *ACLU of Ohio v. Capitol Square Review & Advisory Bd.*, 243 F.3d 289, 306 (6th Cir. 2001) ("Unless it seems to be a sham... the government's assertion of a legitimate secular purpose is entitled to deference." *Brooks v. City of Oak Ridge*, 222 F.3d 259, 265 (6th Cir. 2000)); *Indian River*, 653 F.3d at 283; *Mellen*, 327 F.3d at 372–73.

In the present matter, the policy's "stated purpose is the solemnization of Board meetings and honoring the diversity of religion in Hotung." *McDonough Found.*, 126 F. Supp. 4th at 138.

The District Court here decided because two Hotung board members had made statements using Christian concepts, "the prayer policy's provision for a solemnizing invocation does not constitute a permissible secular purpose," adding, "[t]here is no secular reason to limit the solemnization to prayers." *Id.* at 144. However, in *Mellen*, the Fourth Circuit held a policy of prayer before compulsory dinners at a state-funded university still passed the first prong of *Lemon*. In *Mellen*, the purpose of the prayer was to "promote religious tolerance, [educate] cadets about religion, and get 'students to engage with their own beliefs.'" *Mellen*, 327 F.3d at 373. The Fourth Circuit strongly expressed doubt about the stated purpose ("we are concerned") but afforded the policy's stated purpose deference, stating, "[w]e are inclined to agree that the purpose of an official school prayer 'is plainly religious in nature' ... however, we will accord [the government] the benefit of all doubt and credit [their] explanation of the prayer's purposes." *Id.* at 374. Hotung's stated aim is secular in rhetoric and in purpose. Therefore, this court should follow the case law, and affirm the Circuit Court's finding that Hotung's stated purpose does not violate the first prong of the *Lemon* test.

### *C. The primary effect of the Hotung Board's solemnization of proceedings does not advance religion, thereby green-lighting Hotung on the second prong of the Lemon test.*

The second prong of *Lemon* demands that a governmental practice not advance or inhibit religion, regardless of its purpose. *Indian River*, 653 F.3d at 284; *Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366, 1380 (3d Cir. 1990). Objectively and through the viewpoint of a reasonable observer, the court examines the totality of evidence, including the "history and ubiquity" of the practice. *Indian River*, 653 F.3d at 284 (quoting *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985)); *Mellen*, 327 F.3d at 374 (noting "this 'primary effect' prong must be assessed objectively"). The second prong asks "whether, irrespective of government's actual purpose, the

practice under review in fact conveys a message of endorsement or disapproval [of religion]." *Mellen*, 327 F.3d at 374 (quoting *Wallace v. Jaffree*, 472 U.S. at 56 n. 42).

Hotung's practice of allowing community religious leaders to provide the invocation at the board meetings on a first come first served basis is the initial bulwark against a violation of the second prong of *Lemon*. By structurally distancing itself from the selection of the prayer-giver, Hotung effectively washes its hands of an endorsement or opposition of religion in the practice. This clear removal from influence is further strengthened by Hotung's method of adding religious leaders to its list:

> The Board compiles a list of eligible leaders by searching the internet, soliciting references from fellow community members, and consulting with the chamber of commerce. A religious leader may also request to be added to the list... The local fire department, law enforcement, and military installation chaplains are automatically added… The policy specifically states that the Board must make every possible effort to schedule a variety of religious speakers and no religious leader may speak at two meetings in a row.

*McDonough Found.*, 126 F. Supp. 4th at 138.

The District Court in its ruling did not elaborate on its reasoning for why Hotung violated the second prong of *Lemon*. In *Indian River*, the school board began their meetings with a prayer, with the stated purpose to solemnize the proceedings. 653 F.3d at 261. The Third Circuit found in that case that "the largely religious content of the prayers would suggest to a reasonable person that the primary effect of the Policy is to promote Christianity," and thus violated the second prong of *Lemon*. *Id.* at 284. At first glance, the Indian River School Board and Hotung's Board seem to be two sides of the same coin, but there is a key difference distinguishing the two—the school board in *Indian River* rotated its prayer-giving through members of its board, while Hotung removed the act of prayer-giving from its board members in almost all circumstances. *Id.* at 262; *McDonough Found.*, 548 F.4d at 206; *McDonough Found.*, 126 F.

Supp. 4th at 138. Taken at the totality of circumstances level, to the reasonable observer, a rotating group of religious leaders does not convey the same endorsement as board members directly leading prayer. Further, in the legislative prayer context discussed previously, this Court has acknowledged that even a chaplain's sixteen-year consecutive term in prayer-giving before legislative body meetings is not enough to violate the Establishment Clause when the chaplain "was reappointed because [of] his performance and personal qualities [being] acceptable to the body appointing him." *Marsh*, 463 U.S. at 793. Therefore, Hotung's removal of the Board from direct decision-making, combined with the makeup of its list of speakers, and policy preventing consecutive meetings led by the same speaker, cement the Board's compliance with the second *Lemon* prong.

***D. Hotung's solemnization of its meetings, through its content-neutral selection policies, does not result in excessive entanglement with religion thereby passing the third prong of Lemon.***

The third prong of *Lemon* provides that a government practice may "not foster an excessive government entanglement with religion." *Indian River*, 653 F.3d at 288. Excessive entanglement entails an examination of the "character and purpose of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority." *Id.* (quoting *Agostini v. Felton*, 521 U.S. 203, 233 (1997)). "'The usual setting for an entanglement clause violation is when a state official… must make determinations as to what activity or material is religious in nature, and what is secular and therefore permissible' … A content-neutral access policy eliminates the need for these distinctions." *Gregoire*, 907 F.2d at 1381 (quoting, in part, *Bender v. Williamsport Area Sch. Dist.*, 741 F.2d 538, 555 (3d Cir. 1984)). Entanglement is also limited to institutional entanglement. *ACLU of Ohio*, 243 F.3d at 308 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 689 (O'Connor, J., concurring)). However, some interaction between church and state has "always

been 'tolerated,'" therefore a complete separation is not expected. *Indian River*, 653 F.3d at 288 (quoting *Child Evangelism Fellowship of N.J., Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 534 (3d Cir. 2004) (Alito, J.)).

In *Coles*, a case in which the courts examined a school board's policy of beginning meetings with prayer, the Sixth Circuit found "excessive entanglement where '[t]he school board decided to include prayer in its public meetings, chose which member from the local religious community would give those prayers, and ... had the school board president himself compose and deliver prayers to those in the audience." *Mellen*, 327 F.3d at 374 (citing *Coles*, 171 F.3d at 385). No such issues are found in the case at bar. The president of the Hotung Board does not himself compose and deliver prayers to those in the audience. He does not ordinarily choose which members of the religious community lead the moments of solemnization. Further, the Hotung Board has historically begun its meetings with a solemnization proceeding and memorialized it in a policy after a period of time. *McDonough Found.*, 126 F. Supp. 4th at 138. The school board president in *Coles*, however, implemented the policy and proceeding simultaneously, effectively making the invocation of prayer a board decision. *Coles*, 171 F.3d at 373.

In *Gregoire*, the Third Circuit held that in order to not violate the Establishment Clause, the Centennial School District could not ban usage of its facilities "for religious purposes" because it would require the School District to illegally entangle itself in "what would almost certainly be complex content-determinations." 907 F.2d at 1382. The Third Circuit maintained a content-neutral access policy would alleviate this issue. *Id.* at 1381. Hotung has such a content-neutral approach, allowing it further freedom from an excessive entanglement clause violation.

For these reasons, Hotung has not violated the third prong of *Lemon*.

## Applicant Details

| | |
|---|---|
| First Name | **Evan** |
| Middle Initial | **M** |
| Last Name | **Meisler** |
| Citizenship Status | **U. S. Citizen** |
| Email Address | **evan.m.meisler@gmail.com** |
| Address | **Address**<br>**Street**<br>**30 w 63rd st., Apt 19A**<br>**City**<br>**New York**<br>**State/Territory**<br>**New York**<br>**Zip**<br>**10023**<br>**Country**<br>**United States** |
| Contact Phone Number | **2162154979** |

## Applicant Education

| | |
|---|---|
| BA/BS From | **Dartmouth College** |
| Date of BA/BS | **June 2015** |
| JD/LLB From | **New York University School of Law**<br>**https://www.law.nyu.edu** |
| Date of JD/LLB | **May 22, 2024** |
| Class Rank | **School does not rank** |
| Law Review/Journal | **Yes** |
| Journal(s) | **New York University Law Review** |
| Moot Court Experience | **Yes** |
| Moot Court Name(s) | **Orison S. Marden Moot Court Competition** |

## Bar Admission

## Prior Judicial Experience

| | |
|---|---|
| Judicial Internships/ Externships | **Yes** |
| Post-graduate Judicial Law Clerk | **No** |

## Specialized Work Experience

## Recommenders

Holmes, Stephen
stephen.holmes@nyu.edu
212-998-6357

Rascoff, Samuel
samuel.rascoff@nyu.edu
(212) 992-8907

Murphy, Liam
liam.murphy@nyu.edu
212-998-6160

**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

Evan M. Meisler
30 W 63rd St., Apt #19A
New York, NY 10023
(216) 215-4979
Evan.Meisler@law.nyu.edu

June 12, 2023

The Honorable Juan R. Sánchez
United States District Court for the Eastern District of Pennsylvania
James A. Byrne United States Courthouse
601 Market St.
Philadelphia, PA 19106

Dear Chief Judge Sánchez:

I am a rising third-year student at New York University School of Law, and I am writing to apply for a clerkship in your chambers for the 2024–2025 term. I am particularly eager to clerk for you because of your well-known dedication to public service. I also have many fond memories of visiting Philadelphia for rowing competitions, and my brother will soon begin his postdoctoral fellowship there. I would be thrilled to work for and learn from you as a clerk in your chambers.

I wish to clerk for two primary reasons. First, I am committed to public service, as illustrated by my non-profit volunteer experience and upcoming State Department internship. Clerking would be both an excellent chance to serve the public and an ideal next step toward a career in government practice. Second, I genuinely enjoy learning, researching, and writing about diverse areas of the law, which led me to serve as an Articles Editor for the *New York University Law Review*, compete in the Marden Moot Court Competition, and pursue teaching and research assistantships. Clerking for you would be an unparalleled opportunity to gain exposure to a wide breadth of legal doctrine.

Last autumn, I was an intern for the Honorable Lewis J. Liman of the United States District Court for the Southern District of New York. I believe that this role, combined with my six years of professional experience before law school, has prepared me to succeed as a clerk in your chambers.

Enclosed please find my resume, law school and undergraduate transcripts, and writing sample. Also enclosed are letters of recommendation from Professors Liam Murphy, Samuel Rascoff, and Stephen Holmes. Judge Liman and Professor Samuel Issacharoff, my Complex Litigation instructor, have also offered to serve as references. They may be reached at (212) 805-0226 and (212) 998-6580, respectively.

If there is any additional information that would be helpful to you, please let me know. Thank you for your consideration.

Respectfully,

Evan Meisler

Evan M. Meisler

**EVAN M. MEISLER**
30 W 63rd St., Apt #19A, New York, NY 10023 | (216) 215-4979 | Evan.Meisler@law.nyu.edu

## EDUCATION

**NEW YORK UNIVERSITY SCHOOL OF LAW**, New York, NY
Candidate for J.D., May 2024
Unofficial GPA: 3.79
Honors: Florence Allen Scholar (top 10% of class based on GPA after first four semesters)
NYU Center for Cybersecurity Cyber Scholar
White & Case / Orison Marden International Public Interest Fellow
Activities: New York University Law Review, Articles Editor & Quantitative Editor
Teaching Assistant to Professors Liam Murphy (Contracts) & Samuel Rascoff (Intelligence Law)
Research Assistant to Professors Samuel Rascoff & Stephen Holmes
Marden Moot Court Competition, Semi-Finalist
Leadership: National Security Law Society, Co-President
International Arbitration Association, Co-President & Treasurer
International Law Society, Board Member

**DARTMOUTH COLLEGE**, Hanover, NH
Bachelor of Arts in Government, June 2015
Honors: Citation of Meritorious Academic Performance for Research on Private Military Contractors
Activities: Rowing, Three-Time Varsity Letterman, Intercollegiate Rowing Association All-Academic Award

## EXPERIENCE

**STATE DEPARTMENT OFFICE OF THE LEGAL ADVISER**, Washington, D.C.
***Incoming Summer Legal Intern***, July 2023-August 2023

**COVINGTON & BURLING**, Washington, D.C.
***Summer Associate***, May 2023-July 2023
Participate in litigation and regulatory matters. Draft memos for appellate, consumer protection, and antitrust practices.

**CHAMBERS OF JUDGE LEWIS J. LIMAN**, New York, NY
***Judicial Intern, U.S. District Court for the Southern District of New York***, August 2022-December 2022
Conducted research and drafted opinions for Title VII, FOIA, false advertising, and cross-border contract disputes.

**INTERNATIONAL LAW COMMISSION**, Geneva, Switzerland
***International Law & Human Rights Fellow***, May 2022-August 2022
Performed academic research and prepared remarks for Commissioner Hassouna on emergent topics in international law. Authored paper on international climate law shared at the 2022 UN Climate Change Conference.

**EVERQUOTE**, Cambridge, MA
***Director of Strategy & Business Development***, July 2018-September 2021
Managed client relationships generating over $30 million in annual revenue. Conducted rigorous qualitative and quantitative analysis to evaluate strategic business opportunities. Managed two direct reports. As co-chair of community service committee, initiated sponsorship of homeless shelter for people suffering from opioid addiction.

**INVESTOR GROUP SERVICES**, Boston, MA
***Private Equity Consultant***, August 2015-June 2018
Delivered 40+ due diligence and portfolio strategy studies for private equity clients. Led case teams consisting of 10+ researchers and associate consultants. Produced timely, high-quality deliverables and built strong client relationships.

## VOLUNTEER EXPERIENCE

**NEIGHBORSHARE**, Cambridge, MA; Head of Donor Growth & Engagement; June 2020-September 2021
Led business development, partnerships, and user research operations for peer-to-peer-giving non-profit startup.

**BRIGHAM AND WOMEN'S HOSPITAL**, Boston, MA; Volunteer Musician; November 2020-September 2021
Performed music over Zoom for patients in Boston-area hospitals during COVID-19 pandemic to boost morale.

## ADDITIONAL INFORMATION

Secret-level security clearance. Proficient in French. President of acapella group Substantial Performance and guitarist. Rowed competitively in Henley Royal Regatta, Heineken Roeivierkamp, and won gold medal at Head of the Charles.

**Name:** **Evan M Meisler**
**Print Date:** **06/07/2023**
**Student ID:** **N11232337**
**Institution ID:** **002785**
**Page:** **1 of 1**

**New York University**
**Beginning of School of Law Record**

**Fall 2021**

School of Law
Juris Doctor
Major: Law

| | | | |
|---|---|---|---|
| Lawyering (Year) | LAW-LW 10687 | 2.5 | CR |
| Instructor: Elizabeth J Chen | | | |
| Criminal Law | LAW-LW 11147 | 4.0 | A |
| Instructor: Rachel E Barkow | | | |
| Torts | LAW-LW 11275 | 4.0 | B+ |
| Instructor: Christopher Jon Sprigman | | | |
| Procedure | LAW-LW 11650 | 5.0 | B+ |
| Instructor: Samuel Issacharoff | | | |
| 1L Reading Group | LAW-LW 12339 | 0.0 | CR |
| Instructor: Benedict W Kingsbury | | | |

| | AHRS | EHRS |
|---|---|---|
| Current | 15.5 | 15.5 |
| Cumulative | 15.5 | 15.5 |

**Spring 2022**

School of Law
Juris Doctor
Major: Law

| | | | |
|---|---|---|---|
| Lawyering (Year) | LAW-LW 10687 | 2.5 | CR |
| Instructor: Elizabeth J Chen | | | |
| Legislation and the Regulatory State | LAW-LW 10925 | 4.0 | B |
| Instructor: Emma M Kaufman | | | |
| International Law | LAW-LW 11577 | 4.0 | A- |
| Instructor: Jose E Alvarez | | | |
| Contracts | LAW-LW 11672 | 4.0 | A |
| Instructor: Liam B Murphy | | | |
| Financial Concepts for Lawyers | LAW-LW 12722 | 0.0 | CR |

| | AHRS | EHRS |
|---|---|---|
| Current | 14.5 | 14.5 |
| Cumulative | 30.0 | 30.0 |

**Fall 2022**

School of Law
Juris Doctor
Major: Law

| | | | |
|---|---|---|---|
| Law and Society in China Seminar | LAW-LW 10871 | 2.0 | A |
| Instructor: Ira Belkin | | | |
| Katherine A Wilhelm | | | |
| Orison S. Marden Moot Court Competition | LAW-LW 11554 | 1.0 | CR |
| Teaching Assistant | LAW-LW 11608 | 2.0 | CR |
| Instructor: Liam B Murphy | | | |
| Constitutional Law | LAW-LW 11702 | 4.0 | A |
| Instructor: Kenji Yoshino | | | |
| Federal Judicial Practice Externship | LAW-LW 12448 | 3.0 | CR |
| Instructor: Michelle Beth Cherande | | | |
| Alison J Nathan | | | |
| Federal Judicial Practice Externship Seminar | LAW-LW 12450 | 2.0 | CR |
| Instructor: Michelle Beth Cherande | | | |
| Alison J Nathan | | | |

| | AHRS | EHRS |
|---|---|---|
| Current | 14.0 | 14.0 |
| Cumulative | 44.0 | 44.0 |

**Spring 2023**

School of Law
Juris Doctor
Major: Law

| | | | |
|---|---|---|---|
| Complex Litigation | LAW-LW 10058 | 4.0 | A+ |
| Instructor: Samuel Issacharoff | | | |
| Arthur R Miller | | | |
| Orison S. Marden Moot Court Competition | LAW-LW 11554 | 1.0 | CR |
| Evidence | LAW-LW 11607 | 4.0 | A+ |
| Instructor: Daniel J Capra | | | |
| Teaching Assistant | LAW-LW 11608 | 1.0 | CR |
| Instructor: Samuel J Rascoff | | | |
| Colloquium on Law and Security | LAW-LW 11698 | 2.0 | A |
| Instructor: Stephen Holmes | | | |
| David M Golove | | | |
| Rachel Anne Goldbrenner | | | |
| Research Assistant | LAW-LW 12589 | 2.0 | CR |
| Instructor: Stephen Holmes | | | |

| | AHRS | EHRS |
|---|---|---|
| Current | 14.0 | 14.0 |
| Cumulative | 58.0 | 58.0 |

Allen Scholar-top 10% of students in the class after four semesters
Staff Editor - Law Review 2022-2023

**End of School of Law Record**

## TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW
## JD CLASS OF 2023 AND LATER & LLM STUDENTS

*I certify that this is a true and accurate representation of my NYU School of Law transcript.*

Grading Guidelines

Grading guidelines for JD and LLM students were adopted by the faculty effective fall 2008. These guidelines represented the faculty's collective judgment that ordinarily the distribution of grades in any course will be within the limits suggested. An A + grade was also added.

Effective fall 2020, the first-year J.D. grading curve has been amended to remove the previous requirement of a mandatory percentage of B minus grades. B minus grades are now permitted in the J.D. first year at 0-8% but are no longer required. This change in the grading curve was proposed by the SBA and then endorsed by the Executive Committee and adopted by the faculty. Grades for JD and LLM students in upper-level courses continue to be governed by a discretionary curve in which B minus grades are permitted at 4-11% (target 7-8%).

| **First-Year JD (Mandatory)** | **All other JD and LLM (Non-Mandatory)** |
|---|---|
| A+: 0-2% (target = 1%) (see note 1 below) | A+: 0-2% (target = 1%) (see note 1 below) |
| A: 7-13% (target = 10%) | A: 7-13% (target = 10%) |
| A-: 16-24% (target = 20%) | A-: 16-24% (target = 20%) |
| ***Maximum for A tier = 31%*** | ***Maximum for A tier = 31%*** |
| B+: 22-30% (target = 26%) | B+: 22-30% (target = 26%) |
| ***Maximum grades above B = 57%*** | ***Maximum grades above B = 57%*** |
| B: remainder | B: remainder |
| B-: 0-8%* | B-: 4-11% (target = 7-8%) |
| C/D/F: 0-5% | C/D/F: 0-5% |

The guidelines for first-year JD courses are mandatory and binding on faculty members; again noting that a mandatory percentage of B minus grades are no longer required. In addition, the guidelines with respect to the A+ grade are mandatory in all courses. In all other cases, the guidelines are only advisory.

With the exception of the A+ rules, the guidelines do not apply at all to seminar courses, defined for this purpose to mean any course in which there are fewer than 28 students.

In classes in which credit/fail grades are permitted, these percentages should be calculated only using students taking the course for a letter grade. If there are fewer than 28 students taking the course for a letter grade, the guidelines do not apply.

Important Notes

1. The cap on the A+ grade is mandatory for all courses. However, at least one A+ can be awarded in any course. These rules apply even in courses, such as seminars, where fewer than 28 students are enrolled.
2. The percentages above are based on the number of individual grades given – not a raw percentage of the total number of students in the class.
3. Normal statistical rounding rules apply for all purposes, so that percentages will be rounded up if they are above .5, and down if they are .5 or below. This means that, for example, in a typical first-year class of 89 students, 2 A+ grades could be awarded.
4. As of fall 2020, there is no mandatory percentage of B minus grades for first-year classes.

NYU School of Law does not rank students and does not maintain records of cumulative averages for its students. For the specific purpose of awarding scholastic honors, however, unofficial cumulative averages are calculated by the Office of Records and Registration. The Office is specifically precluded by faculty rule from publishing averages and no record will appear upon any transcript issued. The Office of Records and Registration may not verify the results of a student's endeavor to define his or her own cumulative average or class rank to prospective employers.

Scholastic honors for JD candidates are as follows:

| | |
|---|---|
| ***Pomeroy Scholar:*** | Top ten students in the class after two semesters |
| ***Butler Scholar:*** | Top ten students in the class after four semesters |
| ***Florence Allen Scholar:*** | Top 10% of the class after four semesters |
| ***Robert McKay Scholar:*** | Top 25% of the class after four semesters |

Named scholar designations are not available to JD students who transferred to NYU School of Law in their second year, nor to LLM students.

Missing Grades

A transcript may be missing one or more grades for a variety of reasons, including: (1) the transcript was printed prior to a grade-submission deadline; (2) the student has made prior arrangements with the faculty member to submit work later than the end of the semester in which the course is given; and (3) late submission of a grade. Please note that an In Progress (IP) grade may denote the fact that the student is completing a long-term research project in conjunction with this class. NYU School of Law requires students to complete a Substantial Writing paper for the JD degree. Many students, under the supervision of their faculty member, spend more than one semester working on the paper. For students who have received permission to work on the paper beyond the semester in which the registration occurs, a grade of IP is noted to reflect that the paper is in progress. Employers desiring more information about a missing grade may contact the Office of Records & Registration (212-998-6040).

Class Profile

The admissions process is highly selective and seeks to enroll candidates of exceptional ability. The Committees on JD and Graduate Admissions make decisions after considering all the information in an application. There are no combination of grades and scores that assure admission or denial. For the JD Class entering in Fall 2021 (the most recent entering class), the 75th/25th percentiles for LSAT and GPA were 174/170 and 3.93/3.73.

**Updated: 10/4/2021**

**New York University**
*A private university in the public service*

School of Law

40 Washington Square South, Room 506
New York, New York 10012-1099
Telephone: (212) 998-6357
E-mail: stephen.holmes@nyu.edu

**Stephen Holmes**
*Walter E. Meyer Professor of Law*

June 5, 2023

Dear Judge:

I am extremely pleased to endorse Evan Meisler's candidacy for a clerkship. I have no hesitation in saying that Meisler is one of the most gifted students I have had the pleasure of knowing in more than forty years of teaching. He is a truly exceptional young legal scholar and would without any doubt be a superb clerk at your court. His final paper in my Colloquium on Law and National Security, a brilliant exposition of Turkiye Halk Bankasi A.S. v. United States, was by far the most penetrating and original paper of the semester.

He also worked for me this spring as a research assistant on the consequences for international law and politics of the Russian invasion of Ukraine. In this capacity he wrote an outstanding series of papers on the reactions to the war in India, Brazil and Turkey. I am not uninformed about these topics but I have to admit that I learned an immense amount from these marvelously written and tightly argued papers. Having benefited from his appetite for hard-work, his curiosity and his ability to summarize crisply difficult material, I cannot speak too highly of his talents for research and writing.

I have no doubt that he would be an extraordinary clerk. I recommend him to you with unreserved enthusiasm.

Cordially,

Stephen Holmes
Walter E. Meyer Professor of Law

**New York University**
*A private university in the public service*

School of Law

40 Washington Square South, 411K
New York, NY 10012-1099
Telephone: (212) 992-8907
Facsimile: (212) 995-4590
E-mail: samuel.rascoff@nyu.edu

**Samuel J. Rascoff**
*Professor of Law*

June 8, 2023

Dear Judge:

I am delighted to recommend Evan Meisler to you for the position of law clerk. Although Evan has never been my student, I got to know him well as my research assistant this past summer and again as my teaching assistant this past semester. Based on our many hours of interaction I can safely say that Evan would make a wonderful clerk. He is extremely smart, highly professional, nimble with technology, and fun to be around.

Last summer I reached out to Evan (on the strength of a glowing recommendation from a colleague) for help in planning a seminar in the legal architecture of espionage and all matters intelligence. He proved very effective at researching the state of the art in the field and collaborated with me over months in generating a compelling syllabus. On the strength of his work as an RA I asked Evan to serve as a TA for the seminar. He excelled at that, too. Whether it was making a last-minute tweak to the syllabus or facilitating clear communication with the seminar members or weighing in thoughtfully about the policy issues in play, Evan proved to be an invaluable TA.

Evan's transcript attests to the fact that his success as an RA and TA was hardly a fluke. He has, of late, developed the habit of earning A+s in very difficult doctrinal classes. On top of that he serves on Law Review and is involved in other worthy extracurricular pursuits.

Thinking back on my own clerkship experiences, Evan is precisely the sort of clerk who will wear well in chambers. He will do excellent work, do it on time, and make it all happen with a sense of joyous dedication.

In short, I say without hesitation: Hire Evan!

Sincerely,

Samuel J, Rascoff

**New York University**
*A private university in the public service*

School of Law

40 Washington Square South
New York, New York 10012-1099
Telephone: (212) 998-6160
Facsimile: (212) 995-4894
Email: liam.murphy@nyu.edu

**Liam Murphy**
*Herbert Peterfreund Professor of Law*
*& Professor of Philosophy*

June 5, 2023

Dear Judge

I write to recommend EVAN MEISLER to you for a clerkship in your chambers. It is a special pleasure to do so. Evan was in my contracts class in the spring of 2022 and served as my TA for contracts last fall. I know him well.

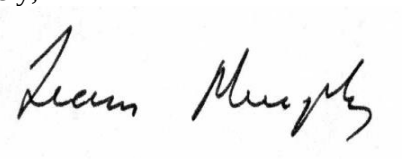
I have rarely been in a position to write for someone who is so clearly already fully prepared for a successful legal career. He is exceptionally mature for a second-year law student. No doubt this is in part because of his six years in the private sector between college and law school. But he nonetheless came to law school as an eager student, and since his second semester has been performing at the very top of the class. His exam for me was excellent, and he was always thoughtful and constructive in class discussion. He was one of my very first choices for a TA. Since then, Evan has gone from strength to strength. He must be especially proud, and rightly so, of the A+ he was just awarded in Professors Samuel Issacharoff and Arthur Miller's complex litigation class, one of the most demanding and competitive classes we offer.

Evan was an excellent teaching assistant. What I have my TAs do is prepare sample problems for discussion with a section of the class. We discuss the problems as a group before the TAs meet with the students. The problems Evan drafted showed creativity and a grasp of contract doctrine as strong as I have seen in any student. But even more important, perhaps, is that he was extremely constructive in helping the other TAs work out kinks in problems they had drafted. He has an unprepossessing, calm manner that allows him to stop colleagues going astray without them feeling at all criticized. Evan is also, as his writing sample shows, an excellent writer. In all, his intelligence, legal acumen, writing skills, and excellent collaborate ability, make him extremely well qualified for a clerkship.

But with Evan there is more. He spent six years in the financial sector. He is now considering a mix of private practice and government service in the defense/intelligence sector. He would also like to teach at some point, perhaps as an adjunct. What I see is a person who knows very well the kind of work he wants to do, even if the exact mix remains to be worked out (and will no doubt turn in part on the opportunities that come his way). That, and a person who is one hundred percent prepared to excel on his chosen path. Evan is not, in other words, merely another very bright young law student with lots of promise. He is already operating with a level of seriousness of purpose and maturity that one would normally expect of an attorney several years on from their clerkships. I believe that Evan will be an unusually valuable clerk.

Let me end by saying that with all his achievements, Evan somehow manages to live a full life, one that includes sports and music, and helping others. He is also charming and easy-going, fully comfortable in his skin. I recommend him very highly and without reservation. Please let me know if I can be of any further assistance.

Sincerely,



The following writing sample is an excerpt of my brief for the semi-final round of NYU's Marden Moot Court Competition. I was assigned to argue that an incarcerated person's FTCA claim which was mailed on time but arrived one day after the statute of limitations had run should be deemed untimely. I have omitted the table of contents, table of authorities, and statement of facts to conform to the 15-page maximum, but am happy to provide the full brief upon request.

This brief is entirely my own work and has not been edited by anybody else. Please note that the competition organizers provided no citation for the imaginary district and circuit court cases that formed the record for this competition. Therefore, all citations to those imaginary cases appear as citations to the record. In actual practice, I would conform to Bluebook convention by citing to all cases by name, identifying the reporter, and providing pinpoint citations as appropriate.

## SUMMARY OF THE ARGUMENT

Plaintiff's FTCA claim was received by the Bureau of Prisons after the relevant limitations period had run. The "prison mailbox rule" does not apply in the face of an explicit statutory and regulatory mandate such as the FTCA's. Accordingly, Young's claim is not timely filed, and the United States' motion for summary judgment should be granted.

The FTCA is a limited waiver of sovereign immunity. Its statute of limitations, as defined by statute and regulation, is a condition of that waiver. Because sovereign immunity can be waived only explicitly, by consent, and at the absolute discretion of Congress, the FTCA's statute of limitations must be construed narrowly and favorably to the Government.

The FTCA's text, and the regulations implementing it, require a claim to be received by the relevant agency within two years of its accrual. A faithful textual interpretation of "receive" would require that Young's claim be placed physically in the Bureau of Prisons' possession within the limitations period. Merely mailing the claim and/or attempting, but failing, to deliver the claim during this period do not satisfy this requirement. The lack of any textual exception for inmates, despite amendments that single out inmates in other ways, signifies that inmates are not to be afforded special leniency under the FTCA. Congress's policy considerations undergirding the FTCA's statute of limitations, as well as the rationales for statutes of limitations in general, buttress the conclusion that physical receipt of a claim within the limitations period is required.

Taken together, the two most relevant Supreme Court cases, Houston v. Lack, 487 U.S. 266 (1988), and Fex v. Michigan, 507 U.S. 43 (1993), stand for the proposition that a statute of limitations' plain text is presumptively controlling, even for inmates such as Young. The court should only entertain policy consideration, which may or may not justify leniency, only in the case of statutory and regulatory silence or ambiguity. Virtually all circuit courts of appeals have

adopted this interpretation. The few that have held otherwise rely on flawed readings of Houston and Fex. The Fourteenth Circuit's expansive construal of the "prison mailbox rule" places Houston in irreconcilable and unnecessary tension with Fex, and should therefore be rejected.

## ARGUMENT

### I. SUMMARY JUDGMENT IS SUBJECT TO *DE NOVO* REVIEW ON APPEAL.

The decision to grant or deny a motion for summary judgment is a question of law, which is reviewed *de novo*. Pierce v. Underwood, 487 U.S. 552, 558 (1988) ("For purposes of standard of review . . . questions of law . . . [are] reviewable *de novo* . . . ."); accord 11 James W. Moore et al., Moore's Federal Practice § 56.131 (3d ed. 2022). A party is entitled to summary judgment if there is "no genuine dispute as to any material fact," Fed. R. Civ. P. 56(a), and if after drawing all factual inferences "in the light most favorable to the party opposing the motion," United States v. Diebold, Inc., 369 U.S. 654, 655 (1962), the moving party is entitled to judgment as a matter of law. See also Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (stating that summary judgment is appropriate where "the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof").

### II. AS A WAIVER OF SOVEREIGN IMMUNITY, THE FTCA DEMANDS A NARROW READING FAVORABLE TO THE GOVERNMENT.

The Federal Tort Claims Act is a waiver of sovereign immunity, a principle which forecloses legal action against the federal government for the tortious acts of its employees unless it consents to liability by statute. See Price v. United States, 174 U.S 373, 375–76 (1899) ("It is an axiom of our jurisprudence. The Government is not liable to suit unless it consents thereto, and its liability . . . cannot be extended beyond the plain language of the statute authorizing it."); Jeffrey Axelrad, Federal Tort Claims Act Administrative Claims: Better than Third-Party ADR for Resolving Federal Tort Claims, 52 Admin. L. Rev. 1331, 1332 (2000) ("Until the Federal Tort

Claims Act was enacted in 1946, no general remedy existed for torts committed by federal agency employees."). Since waivers of sovereign immunity are acts of legislative grace, the terms and conditions of any such waiver are entirely within Congress's discretion. See Schillinger v. United States, 155 U.S. 163, 166 (1894) (noting that "Congress has an absolute discretion to specify the cases and contingencies" in which the government may be held liable).

The terms of any sovereign immunity waiver must be construed narrowly. See Irwin v. Dep't of Veterans Affs., 498 U.S. 89, 94 (1990) (requiring that "condition[s] to the waiver of sovereign immunity . . . must be strictly construed"); United States v. Mitchell, 445 U.S. 535, 538 (1980) ("A waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'") (quoting United States v. King, 395 U.S. 1, 4 (1969)). Absent a clear statutory indication to the contrary, disputes as to sovereign immunity should be resolved in favor of the Government. See Lane v. Pena, 518 U.S. 187, 195 (1996) (noting the Court's "established practice of construing waivers of sovereign immunity narrowly in favor of the sovereign"). The Court has specifically applied this pro-Government "rule of construction," United States v. Nordic Vill. Inc., 503 U.S. 30, 34 (1992), to the FTCA's statute of limitations. See United States v. Kubrick, 444 U.S. 111, 117 (1979) (describing the FTCA's statute of limitations as a "condition of [the] waiver" which the Court should not "extend . . . beyond that which Congress intended").

The foregoing considerations demand that the Court only adopt Respondent's lenient construal of the FTCA and relevant precedent if the statutory text and case law unequivocally compel their preferred reading. The following sections demonstrates that this is not the case.

## III. TREATING CLAIMS RECEIVED AFTER EXPIRATION OF THE LIMITATIONS PERIOD AS TIMELY CONTRADICTS THE FTCA'S TEXT AND PURPOSE.

Nobody disputes that Young's claim was not successfully delivered to BOP during the limitations period. R. at 4, 13. This section draws on the FTCA's text and purpose to refute the argument that Young's claim was "received," for limitations purposes, at some earlier juncture, such as when it was given to prison authorities, mailed, or when the failed delivery took place.

A. The FTCA's Plain Text Requires Timely Physical Receipt of Claims by the BOP.

The FTCA requires that an "action shall not be instituted upon a claim against the United States" until the claimant has exhausted his administrative remedies by first "present[ing] the claim to the appropriate Federal agency . . . ." 28 U.S.C. § 2675(a); see McNeil v. United States, 508 U.S. 106, 107 (1993) (stating that the presentment requirement is "unambiguous" from the text of the FTCA). Presentment must take place "within two years after such claim accrues," and a claim is "forever barred" for failure to adhere to this timeline. 28 U.S.C. § 2401(b).

Congress authorized the Attorney General to issue regulations defining the conditions of presentment and the statute of limitations. 28 U.S.C. § 2672. A claim is considered "presented" when "a Federal agency *receives* from a claimant . . . an executed Standard Form 95 or other written notification of an incident . . . ." 28 C.F.R. § 14.2(a) (emphasis added). The relevant agency is the one "whose activities gave rise to the claim," id., in this case the Bureau of Prisons. Agencies are further enabled to "issue regulations and establish procedures" governing receipt of claims. 28 C.F.R. § 14.11. The Bureau of Prisons requires that claimants "either mail or deliver the claim to the regional office in the region where the claim occurred." 28 C.F.R. § 543.31(c).

A claim is "presented" when it is "received" by the BOP's regional office. 28 C.F.R. § 14.2(a); 28 C.F.R. § 543.31(c). "Receive" means to "come into possession of or get from some outside source." Receive, Black's Law Dictionary (11th ed. 2019); see also Receive, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/receive (last visited Mar. 10, 2023)

(defining "receive" as "to come into possession of"). The notion that a claim could be considered "presented" or "received" when handed to a local prison official is incompatible with the FTCA's text, because such a claim clearly has not come into the possession of BOP's regional office. Nor can a claim be considered "received" when it is mailed, because BOP is not in possession of claims still in transit. And even if, counterfactually, "receive" were ambiguous, the Department of Justice's interpretation of DOJ and BOP regulations is, at a minimum, supported by valid reasoning and thus deserving of respect. See Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

This understanding of the receipt requirement is reinforced by intratextual analysis. Other deadlines in the FTCA refer to the time of "mailing," indicating that if Congress meant for mailing to fulfill the presentment requirement, it would have written the statute to say so. See, e.g., 28 U.S.C. § 2401(b) (requiring tort claims to be initiated within six months after the agency mails notice of final denial of an administrative claim); see also Barnhart v. Sigmon Coal Co., Inc., 534 U.S. 438, 452 (2002) (noting the "general principle of statutory construction" that when "'Congress includes particular language in one section of a statute but omits it in another section of the same Act,'" it is presumed to be done intentionally) (quoting Russello v. United States, 464 U.S. 16, 23 (1983)); accord. Henry J. Friendly, Benchmarks 224 (Univ. Chi. Press 1967).

The plain text also forecloses the argument that the failed attempt to deliver Young's claim on February 14 constitutes presentment, because this attempt did not transfer possession of his claim to the BOP. Federal courts have held that failed delivery is not presentment. See, e.g., Sacks v. U.S. Dep't of Health & Hum. Servs., No. 16-cv-05505-MEJ, 2017 WL 2472952, at *3 (N.D. Cal. June 8, 2017) (holding that failed delivery of an FTCA claim on a non-business day did not establish presentment). Requiring successful delivery is consistent with the judicial construction of other statutes of limitations as well. See, e.g., In re World Imports, 862 F.3d 338, 241–42 (3d

Cir. 2017) (holding that, according to dictionary definitions and UCC interpretation, goods are "received" only when the debtor takes physical possession of them); Group Italglass U.S.A., Inc. v. United States, 839 F. Supp. 868, 870 (Ct. Int'l Trade 1993) (finding a duties protest untimely after plaintiff attempted to deliver it in-person and by fax after business hours on the final day of the limitations period); cf. Turner v. City of Newport, 887 F. Supp. 149, 150 (E.D. Ky. 1995) (accepting an after-hours court filing on the last day of a limitations period because it was deposited on the correct date and the courts are "always open" for filing) (citing Fed. R. Civ. P. 77).

Lastly, the absence of any textual exception for inmate claims speaks for itself. This absence is especially instructive because other FTCA sections were amended with inmate-specific language in 1995, shortly after the Court declined to apply the prison mailbox rule in Fex, 507 U.S. at 52. See Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 806, 110 Stat. 1231-66, 1321-75 (1996) (amending FTCA to prohibit incarcerated felons from suing the government for mental suffering alone). If Congress meant to overrule Fex by creating a rule of leniency for inmate filings, it would have done so. See Apex Hosiery Co. v. Leader, 310 U.S. 469, 488 (1940) (noting that Congress's decision not to overturn the judicial interpretation of a statute that it has chosen to amend suggests "legislative recognition that the judicial construction is the correct one").

"[F]ew areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations." Wilson v. Garcia, 471 U.S. 261, 266 (1985) (quoting Chardon v. Fumero Soto, 462 U.S. 650, 667 (1983) (Rehnquist, J., dissenting)). In addition to waiving sovereign immunity, the FTCA governs "a vast multitude of claims" which "impose[] some burden on the judicial system" whenever the statutorily mandated procedures are not obeyed. McNeil v. United States, 508 U.S. at 112. "The interest in orderly administration of this body of litigation is best served by adherence to the straightforward statutory command" which, in turn,

calls for "the most natural reading of the statute." Id. The waiver of sovereign immunity and the interest in efficient and uniform administration of the law strongly support giving "receive" its ordinary meaning, rather than endorsing Respondent's proposed concept of constructive receipt.

Moreover, applying an expansive definition of "receipt" to the FTCA, wherein Congress and the Executive have promulgated unambiguous language calling for the timely physical receipt of a claim, is tantamount to declaring that the political branches shall not have the last word in crafting statutes of limitations. This message would be inconsistent with the Court's holding that statutes of limitations are "subject to a relatively large degree of legislative control," Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945), especially in the highly discretionary context of a waiver of sovereign immunity. See Schillinger v. United States, 155 U.S. at 166.

B. Requiring Timely Physical Receipt of Claims Furthers the FTCA's Policy Goals.

The FTCA's legislative history and animating policy considerations provide further support for the requirement of actual physical receipt of a claim within two years of its accrual. Congress amended the FTCA in 1966 to include a presentment requirement so that agencies could quickly identify and settle meritorious claims against it, thereby averting pointless lawsuits. See S. Rep. No. 1327, at 4 (1966). The resulting efficiencies would "benefit private litigants, but would also be beneficial to the courts, the agencies, and the Department of Justice itself." Id. at 2. Congress's explicit concern for these stakeholders mirrors the justifications for statutes of limitations in general: repose, accuracy, and discouraging procrastination. These policy interests are best served by requiring the timely physical, rather than constructive, receipt of claims.

First, statutes of limitations benefit *defendants* by supplying a guarantee of repose. See Walker v. Armco Steel Corp., 446 U.S. 740, 751 (1980) ("The statute of limitations establishes a deadline after which the defendant may legitimately have peace of mind . . . ."); Wilson v. Garcia,

471 U.S. at 271 ("[E]ven wrongdoers are entitled to assume that their sins may be forgotten."). They also protect defendants from the aggravated time, expense, and risk of error associated with defending stale claims "in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." United States v. Kubrick, 444 U.S. at 117. They protect defendants not only from lackadaisical plaintiffs, but also from fraudsters seeking to "assert[] rights after the lapse of time ha[s] destroyed or impaired the evidence which would show that such rights never existed . . . ." Bailey v. Glover, 88 U.S. 342, 349 (1874). An agency cannot and will not begin the important process of preserving relevant evidence, or relinquish its legitimate expectation of repose, unless and until a claim has been physically delivered into its possession.

Second, statutes of limitations serve *the judiciary* by extinguishing claims that would require the onerous investigation of distant historical facts. See, e.g., Resolution Tr. Corp. v. Farmer, 865 F. Supp. 1143, 1152 (E.D. Pa. 1994) (stating that statutes of limitations are justified by considerations of "judicial economy"); Goad v. Celotex Corp., 831 F.2d 508, 511 (4th Cir. 1987) (describing statutes of limitations as "instruments of public policy and of court management"). They also bolster social efficiency by enabling parties to order their affairs without fear of liability for old transactions reemerging. See Developments in the Law: Statutes of Limitations, 63 Harv. L. Rev. 1177, 1185 (1950) ("[T]he public policy of limitations lies in avoiding the disrupting effect that unsettled claims have on commercial intercourse."). Agencies, courts, and private entities can plan and allocate resources more efficiently knowing that incidents whose statutes of limitations have run will not resurface by surprise due to late-arriving mail.

Finally, statutes of limitations serve *plaintiffs* by encouraging action while their claims are fresh. Crown v. Parker, 462 U.S. 345, 352 (1983) ("Limitations periods are intended . . . to

prevent plaintiffs from sleeping on their rights . . . ."). Spurring plaintiffs to act protects them from jurors who may be inclined to penalize perceived procrastinators. See Riddlesbarger v. Hartford, 74 U.S. 386, 390 (1868) (noting that statutes of limitations exist because a valid claim is "not usually allowed to remain neglected," so the passage of time creates "a presumption against its original validity"); Wood v. Carpenter, 101 U.S. 135, 139 (1879) (stating that statutes of limitations are intended to "stimulate to activity and punish negligence"). Leniently applying the FTCA's statute of limitations would thus enable plaintiffs to undermine their own interests by sitting on their hands, thereby permitting evidence to decay and inviting a jury's prejudice.

It would be unavailing for Young to claim that the FTCA's requirements are arbitrary, unfair to inmates, or that his failure to adhere to them is inconsequential and excusable. Statutes of limitations "are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the avoidable and unavoidable delay." Chase Sec. Corp. v. Donaldson, 325 U.S. at 314 . Statutes of limitations represent a legislative judgment as to when "the need for repose and avoiding stale claims outweighs the interests in enforcing the claim." Katharine F. Nelson, The 1990 Federal "Fallback" Statute of Limitations: Limitations by Default, 72 Neb. L. Rev. 454, 462 (1993). Congress's choice to "cut off rights, justifiable or not . . . must be strictly adhered to by the judiciary," and any "remedies for resulting inequities are to be provided by Congress, not the courts." Kavanagh v. Noble, 332 U.S. 535, 539 (1947). Applying the prison mailbox rule to the FTCA, where Congress has spoken clearly as to the length and terms of the limitations period, would subvert the legislative intent and thwart the policy considerations animating both the FTCA in particular and statutes of limitations in general.

## IV. THE PRISON MAILBOX RULE IS INAPPLICABLE TO YOUNG'S CLAIM BECAUSE THE FTCA'S FILING REQUIREMENTS ARE UNAMBIGUOUS.

A. Fex v. Michigan and Houston v. Lack Require Inmates to Obey Unambiguous Statutory and Regulatory Filing Requirements.

The district court and the Fourteenth Circuit relied principally on Houston v. Lack, 487 U.S. 266 (1988), and Fex v. Michigan, 507 U.S. 43 (1993) to justify their decisions. R. at 5, 14–15. In Houston, the Court adopted the prison mailbox rule for unrepresented inmates' notices of appeal, holding that such a notice is "filed" for purposes of the Federal Rules of Civil Procedure when it is handed to prison authorities for mailing. Houston, 487 U.S. at 270. In Fex, the Court declined to apply the prison mailbox rule to an inmate's request for final disposition of charges pursuant to the Interstate Agreement on Detainers ("IAD"). Fex, 507 U.S. at 52. The Court reasoned that the IAD's statute of limitations, which requires trial within 180 days after the inmate "shall have caused to be delivered" his request, starts to run on the date of actual receipt. Id.

Contrary to the Fourteenth Circuit's interpretation, Houston did not hold that the prison mailbox rule applies to all filings by inmates regardless of the statutory or regulatory scheme. R. at 14. Rather, the Houston Court implicitly accepted that the filing requirements were controlling, but held that the statute and rule furnishing these requirements were ambiguous:

> Respondent stresses that a petition for habeas corpus is . . . subject to the statutory deadline set out in 28 U.S.C. § 2107. But . . . [t]he statute . . . does not define when a notice of appeal has been "filed" or designate the person with whom it must be filed . . . and nothing in the statute suggests that . . . it would be inappropriate to conclude that a notice of appeal is "filed" within the meaning of § 2107 at the moment it is delivered to prison officials for forwarding . . . .

Houston, 487 U.S. at 272. The Court similarly emphasized the importance of statutory ambiguity in its discussion of the Federal Rules of Appellate Procedure's filing requirements:

> The question is . . . whether the moment of "filing" occurs when the notice is delivered to the prison authorities or at some later juncture in its processing. The Rules are not dispositive on this point, for neither Rule sets forth criteria for determining the moment at which the "filing" has occurred.

Id. at 273. If the Court meant to hold that inmates should categorically be treated leniently with respect to filing deadlines, it would have said so, and need not have engaged in statutory interpretation, which the Fourteenth Circuit declined to do. R. at 15. Properly read, Houston does not cast doubt on the idea that clearly defined statutory and regulatory filing deadlines, such as the FTCA's, are binding on inmates. Only after first exhausting its analysis of the statute and finding it ambiguous did the Court turn to "policy grounds" to justify leniency. Id. at 275.

The Fex Court rejected the prison mailbox rule due partly to "indications in the text," only resorting to policy considerations, as in Houston, because "the text alone [was] indeterminate." Fex, 507 U.S. at 52. Fex thus provides two lessons. First, Houston's prison mailbox rule does not apply automatically to all claims by inmates; if it did, Fex necessarily would have been come out differently. Second, sympathy for incarcerated inmates' special circumstances cannot overcome a textually unambiguous filing requirement prescribed by statute. Fex, 507 U.S. at 52 (declaring that policy arguments about "fairness" are "more appropriately addressed to . . . legislatures," and rejecting readings of the IAD of which the text "is simply not susceptible"). Even the Fex dissent focused on the statutory text, briefly mentioning Houston only to recall its policy considerations. See id. at 58. The dissenters restated Houston's holding narrowly as "a *pro se* prisoner's *notice of appeal* is 'filed' at the moment it is conveyed to prison authorities . . . ." Id. (Blackmun, J., dissenting) (emphasis added), which is far narrower than the Fourteenth Circuit's holding. R. at 14. No Justices, either in Houston or Fex, espoused the Fourteenth Circuit's extreme stance.

Unlike the statutes and rules at issue in Houston and Fex, the FTCA's statutory and regulatory scheme is unambiguous. As discussed in Part III.A., the FTCA's plain text requires that the BOP's regional office must physically receive a would-be plaintiff's claim within two years of accrual. Thus, Houston and Fex dictate that the prison mailbox rule does not apply here.

The Fourteenth Circuit found Fex to be inapplicable because its animating policy concern, namely the fear of precluding meritorious prosecutions, Fex, 507 U.S. at 50, is absent in this case. R. at 14. Accordingly, the court held that fairness and the balance of the parties' interests favor an expansive application of the prison mailbox rule. R. at 15. This reasoning is erroneous for three reasons. First, as just discussed, neither Houston nor Fex suggests that policy considerations suffice to override the FTCA's clear statutory text. Second, as discussed in Part III.B. above, every statute of limitations, including the FTCA's, is animated by compelling policy considerations that are best served by strict judicial interpretation. The Fourteenth Circuit does not explain why the considerations favoring leniency outweigh the policy determinations that motivated Congress, the Department of Justice, and the BOP to implement the FTCA's presentment requirement in the first place. Thus, even if policy considerations were dispositive, Respondent has given insufficient reasons to hold that these considerations command leniency. Third, the need for leniency in unusual circumstances is already met by doctrinal exceptions to statutes of limitations. For example, a court may deem a claim timely filed if a plaintiff's mail was unreasonably rejected, or the plaintiff has shown "excusable neglect," or if extenuating circumstances inhibited the plaintiff from accessing the mail, or under the doctrine of equitable tolling. See Huskey v. Fisher, 601 F. Supp. 3d 66, 76–78 (N.D. Miss. 2022) (explaining how these doctrines can be used to render a late claim timely). But these arguments are conspicuously absent from the record, and the Court should not contort or disregarding its own precedent to make up for plaintiff's failure to plead them.

Lastly, the Fourteenth Circuit's concern about Fex silently overruling Houston is mistaken. R. at 15. The Government's interpretation is that Fex announces a general rule that inmates must obey textually unambiguous statutory filing guidelines; Houston provides an exception if, and only if, the statute is ambiguous and policy reasons clearly favor leniency. Thus, the Government

merely suggests that Fex clarifies the outer limits of Houston which, unlike overruling by implication, is a commonplace phenomenon in Supreme Court jurisprudence. See generally Richard M. Re, Narrowing Precedent in the Supreme Court, 114 Colum. L. Rev. 1861 (2014). Conversely, by reading Houston more expansively than its language permits, the Fourteenth Circuit's holding places these otherwise consistent cases at loggerheads, raising the very specter of silent overruling which it so strenuously cautions against. The courts of appeals agree that the Government's interpretation leaves these mutually compatible cases intact, as discussed next.

B. Most Courts of Appeals Have Adopted the Government's Interpretation of Fex.

"[V]irtually every circuit to have ruled on the issue has held that the mailbox rule does not apply to [FTCA] claims." Vacek v. U.S. Postal Serv., 447 F.3d 1248, 1252 (9th Cir. 2006); see, e.g., Smith v. Conner, 250 F.3d 277, 278 (5th Cir. 2001) ("Houston interpreted an undefined term in a federal rule of procedure; it did not announce a universal rule for prisoner filings. . . . [W]hen the language of the governing rule clearly defines the requirements for filing, the text of the rule should be enforced as written.") (citing Fex, 507 U.S. at 52); Nigro v. Sullivan, 40 F.3d 990, 995 (9th Cir. 1994) ("Fex instructs that Houston policies cannot override the plain meaning of a procedural rule."); Longenette v. Krusing, 322 F.3d 758, 762–63 (3d Cir. 2003) ("Houston's narrow holding . . . was designed to protect pro se prisoners in the absence of a clear statutory or regulatory scheme."); Moya v. United States, 53 F.3d 501, 504 (10th Cir. 1994) ("Under the FTCA . . . a request for reconsideration is not presented to an agency until it is received by the agency. Mailing of a request for reconsideration is insufficient to satisfy the presentment requirement."); Garvey v. Vaughn, 993 F.2d 776, 782 n.15 (11th Cir. 1993) ("Houston is restricted to federal *court* filings; a notice of appeal given to prison authorities for delivery to a person or entity other than a federal court is not included in 'Houston's mailbox rule.'"); see also Velez-Diaz v. United States,

507 F.3d 717, 719–20 (1st Cir. 2007) (refusing to apply the mailbox rule to an FTCA claim because the statute's time limit is "a condition of the United States' waiver of sovereign immunity," and thus failure to comply is "a fatal defect."); Bellecourt v. United States, 994 F.2d 427, 430 (8th Cir. 1993) (noting that presentment is "construed narrowly" and that an FTCA claimant bears the burden of showing it is met). District courts in circuits that have not yet ruled on this issue have recognized and adopted the majority rule. See, e.g., Boomer v. Deboo, No. 2:11-CV-07, 2012 WL 112328, at *2 (N.D.W. Va. Jan. 12, 2012) (noting that the Fourth Circuit has yet to address this issue, and following "virtually every other circuit" by holding that "the mailbox rule does not apply to [FTCA] claims") (quoting Vacek, 447 F.3d at 1252); Lakin v. U.S. Dep't of Just., 917 F. Supp. 2d 142, 145–46 (D.D.C. 2013) (declining to apply the mailbox rule to a FOIA appeal because the administrative receipt requirement distinguished it from Houston).

Only two Courts of Appeals disagree. The Second Circuit extended Houston to FTCA claims because it felt there was "no difference between the filing of a court action," the subject of Houston, and "the filing of an administrative claim." Tapia-Ortiz v. Doe, 171 F.3d 150, 152 (2d Cir. 1999). However, the Second Circuit agreed, in line with Petitioner's argument, that "Houston does not apply, of course, when there is a specific statutory regime to the contrary." Id. at 152 n.1 (citing Fex, 507 U.S. at 43). Thus, the Second Circuit's holding seemingly hinges on a specious distinction between administrative regulations and statutes. The FTCA's administrative requirements are "issued by an agency pursuant to statutory authority," thereby giving them "the force and effect of law." Chrysler Corp. v. Brown, 441 U.S. 281, 302–03 (1979); 28 U.S.C. § 2672. Accordingly, the Second Circuit's conclusion was flawed and should not be followed.

The Seventh Circuit held that Houston applies to FTCA claims for two reasons: first, because to hold otherwise suggests that Fex silently overruled Houston, Censke v. United States,

947 F.3d 488, 492 (7th Cir. 2020), and second, because it read Fex to call for an interest-balancing analysis which, in the case of inmate FTCA claims, favors claimants like Young. Id. at 492–93.

Both rationales are unpersuasive. First, as discussed in Part IV.A., Petitioner's reading of Fex is perfectly compatible with Houston. The Seventh Circuit tries to reconcile the cases by claiming that policy considerations absent from Fex gave the Houston Court "sufficient basis to depart from the receipt-based rule applicable 'in the ordinary civil case.'" Id. at 491 (citing Houston, 487 U.S. at 273). If this were true, the Houston Court would have simply said so, rather than dwelling on the Federal Rules' textual ambiguity before eventually turning to policy and fairness. Houston, 487 U.S. at 274. Second, the Seventh Circuit's assertion that Fex espouses an interests-balancing approach is incorrect. The Fex Court considered the balance of harms only as an interpretive aid, and only because "the text alone [was] indeterminate." Fex, 507 U.S. at 52 (rejecting inquiries as to "fairness"). The Seventh Circuit's construal of Fex and Houston as being about balancing the parties' interests is an unfounded judicial outlier that should not be followed.

## CONCLUSION

For the foregoing reasons, Respondent's invocation of the prison mailbox rule does not apply to the FTCA's statute of limitations, which is controlling under Houston and Fex. The Court should therefore reinstate the district court's grant of summary judgment for Petitioner.

## Applicant Details

| | |
|---|---|
| First Name | **Natasha** |
| Last Name | **Menon** |
| Citizenship Status | **U. S. Citizen** |
| Email Address | **nm3967@nyu.edu** |
| Address | **Address**<br>Street<br>**72 Willoughby St 3H**<br>City<br>**Brooklyn**<br>State/Territory<br>**New York**<br>Zip<br>**11201**<br>Country<br>**United States** |
| Contact Phone Number | **6028289721** |

## Applicant Education

| | |
|---|---|
| BA/BS From | **University of Pennsylvania** |
| Date of BA/BS | **May 2020** |
| JD/LLB From | **New York University School of Law**<br>**https://www.law.nyu.edu** |
| Date of JD/LLB | **May 22, 2024** |
| Class Rank | **School does not rank** |
| Law Review/Journal | **Yes** |
| Journal(s) | **Review of Law and Social Change** |
| Moot Court Experience | **No** |

## Bar Admission

## Prior Judicial Experience

| | |
|---|---|
| Judicial Internships/Externships | **No** |
| Post-graduate Judicial Law Clerk | **No** |

## Specialized Work Experience

## Recommenders

Cox, Adam
adambcox@nyu.edu
(212) 992-8875
Azmy, Baher
BAzmy@ccrjustice.org
212-614-6464
Monfredo, Nina
nmonfredo@youthlaw.org
917-502-7824

**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

June 12, 2023

The Honorable Juan R. Sanchez
United States District Court
Eastern District of Pennsylvania
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, Pennsylvania 19106-1729 United States

Dear Judge Sanchez:

I am a rising third-year law student at New York University School of Law, and I write to apply for a clerkship in your chambers beginning in 2024 or any term thereafter. I am deeply committed to a career in public service, and the opportunity to learn from your experience and gain insight into the judicial decision-making process would be of unparalleled value. Having attended the University of Pennsylvania, I have grown to love Philadelphia and would be eager to return.

I plan to pursue a career in impact litigation and policy advocacy. I was awarded the Arthur Garfield Hays Civil Liberties Fellowship for students focused on advancing civil rights as well as the Derrick Bell Scholarship for Public Service which is awarded by the NYU Law Alumni of Color Association for commitment to the public interest.

Before pursuing my JD degree, I sharpened my analytical skills through a Master of Science in International Migration and Public Policy. Through courses on the design of evidence- informed public policies, I extensively studied the key mechanisms behind effective immigration policies and their implications on society at-large. This past summer, I interned at the New York Legal Assistance Group's Immigrant Protection Unit and was able to ground my academic findings in civil legal direct services. In addition, I interned with the National Center for Youth Law where I researched policy initiatives and drafted legal memos. I also strengthened my legal research and writing skills and served as a judge in simulations of Supreme Court oral arguments while participating in the Constitutional Litigation seminar with the Honorable John G. Koeltl. I hope to use what I have learned while interning this summer at the NAACP Legal Defense Fund in their education, criminal justice, and economic justice projects.

Please find my resume, transcript and writing sample enclosed. Separately, you will receive letters of recommendation from the following individuals:

Professor Adam Cox, (212) 992-8875, adambcox@nyu.edu
Professor Baher Azmy, (212) 614-6427, bazmy@ccrjustice.org
Nina Monfredo, (917) 502-7824, nmonfredo@youthlaw.org

I worked as a Research Assistant for Professor Cox and took his classes in Legislation and the Regulatory State, as well as Immigration Law & Rights of Non Citizens. I have taken Civil Rights Law with Professor Baher Azmy and Nina Monfredo was my supervisor while I interned with the National Center for Youth Law. I would welcome the opportunity to interview with you. You can reach me by phone at (602) 828-9721 and by email at nm3967@nyu.edu. Thank you for your time and consideration.

Respectfully,

/s/

Natasha Menon

# NATASHA MENON

72 Willoughby St. #3H, Brooklyn, New York 11201 | (602) 828-9721 | nm3967@nyu.edu


## EDUCATION

**NEW YORK UNIVERSITY SCHOOL OF LAW**, New York, NY
Candidate for J.D., May 2024

Honors: *Derrick Bell Scholarship for Public Service* – NYU Law Alumni of Color Association award for commitment to public service
*Arthur Garfield Hays Civil Liberties Fellowship* – 3L program for students focused on advancing civil rights
*Elizabeth Frankel Immigrant Rights Fellowship* – Scholarship to pursue a summer internship in immigration services
*Review of Law and Social Change*, Staff Editor
Quarterfinalist at Peter James Johnson National Civil Rights Mock Trial Competition

Activities: South Asian Law Students Association, Co-President
Women of Color Collective, 2L Leadership Co-Chair
Coalition on Law & Representation, Leadership Collective Member
Rose Sheinberg Committee, 2L Representative

**LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE**, London, UK
M.Sc. in International Migration and Public Policy, *with distinction,* August 2021
Dissertation: *Visible but Vulnerable: Why Have Legal Safeguards for Unaccompanied Children at the U.S.-Mexico Border Failed to Function Effectively?*

**UNIVERSITY OF PENNSYLVANIA**, Philadelphia, PA
B.A. in Philosophy, Politics and Economics, *summa cum laude,* May 2020
Minor: History and Legal Studies
Thesis: *A Comparative Analysis of Urban Eviction Prevention Policies in New York City, Philadelphia, and San Francisco*
Honors: Phi Beta Kappa
Thouron Award – *A one-year fellowship to pursue a Master's program in the UK*
Trustees' Council of Penn Women Student Leadership Award
Wharton Public Policy Initiative Case Competition Winner
Penn Civic Scholars
Activities: Undergraduate Assembly, Student Body President
Professor Domenic Vitiello, Research Assistant (September 2017 – March 2019)

## EXPERIENCE

**NAACP LEGAL DEFENSE FUND,** New York, NY
***Litigation Intern,*** May 2023 – August 2023
Drafted memoranda related to school desegregation and researched the retroactive applicability of statutes to capital cases.

**PROFESSOR ADAM COX, NYU SCHOOL OF LAW,** New York, NY
***Research Assistant,*** May 2022 – May 2023
Conducted a literature review of the role of race in administrative law and researched immigration law exceptionalism.

**NYU IMMIGRANT DEFENSE CLINIC,** New York, NY
***Legal Aid Immigration Unit Student Advocate***, January 2023 – April 2023
Produced requests for prosecutorial discretion and briefs for the defense of detained indigent noncitizens.

**NATIONAL CENTER FOR YOUTH LAW,** Oakland, CA
***Legal Intern***, September 2022 – December 2022
Researched relevant case law and formulated memos for impact litigation centering on youth justice and education.

**NEW YORK LEGAL ASSISTANCE GROUP,** New York, NY
***Immigrant Protection Unit Intern***, May 2022 – August 2022
Prepared briefs for asylum applications. Interviewed clients and translated documents for U visa requests.

**Name:** **Natasha Menon**
**Print Date:** **06/02/2023**
**Student ID:** **N18671756**
**Institution ID:** **002785**
**Page:** **1 of 1**

**New York University**
**Beginning of School of Law Record**

**Fall 2021**

School of Law
Juris Doctor
Major: Law

| | | | |
|---|---|---|---|
| Lawyering (Year) | LAW-LW 10687 | 2.5 | CR |
| Instructor: Tyler Rose Clemons | | | |
| Torts | LAW-LW 11275 | 4.0 | B+ |
| Instructor: Mark A Geistfeld | | | |
| Procedure | LAW-LW 11650 | 5.0 | B+ |
| Instructor: Helen Hershkoff | | | |
| Contracts | LAW-LW 11672 | 4.0 | A- |
| Instructor: Richard Rexford Wayne Brooks | | | |
| 1L Reading Group | LAW-LW 12339 | 0.0 | CR |
| Instructor: Alina Das | | | |

| | AHRS | EHRS |
|---|---|---|
| Current | 15.5 | 15.5 |
| Cumulative | 15.5 | 15.5 |

**Spring 2022**

School of Law
Juris Doctor
Major: Law

| | | | |
|---|---|---|---|
| Constitutional Law | LAW-LW 10598 | 4.0 | B |
| Instructor: Daryl J Levinson | | | |
| Lawyering (Year) | LAW-LW 10687 | 2.5 | CR |
| Instructor: Tyler Rose Clemons | | | |
| Legislation and the Regulatory State | LAW-LW 10925 | 4.0 | B+ |
| Instructor: Adam B Cox | | | |
| Criminal Law | LAW-LW 11147 | 4.0 | A- |
| Instructor: Ekow Nyansa Yankah | | | |
| 1L Reading Group | LAW-LW 12339 | 0.0 | CR |
| Instructor: Alina Das | | | |
| Financial Concepts for Lawyers | LAW-LW 12722 | 0.0 | CR |

| | AHRS | EHRS |
|---|---|---|
| Current | 14.5 | 14.5 |
| Cumulative | 30.0 | 30.0 |

**Fall 2022**

School of Law
Juris Doctor
Major: Law

| | | | |
|---|---|---|---|
| Civil Rights | LAW-LW 10265 | 4.0 | A- |
| Instructor: Baher A Azmy | | | |
| Evidence | LAW-LW 11607 | 4.0 | B |
| Instructor: Erin Murphy | | | |
| Immigration Law & Rights of Non Citizens | LAW-LW 11610 | 4.0 | B+ |
| Instructor: Adam B Cox | | | |

| | AHRS | EHRS |
|---|---|---|
| Current | 12.0 | 12.0 |
| Cumulative | 42.0 | 42.0 |

**Spring 2023**

School of Law
Juris Doctor
Major: Law

| | | | |
|---|---|---|---|
| Constitutional Litigation Seminar | LAW-LW 10202 | 2.0 | A |
| Instructor: John G Koeltl | | | |
| Immigrant Defense Clinic Seminar | LAW-LW 10230 | 2.0 | A |
| Instructor: Jojo Annobil<br>Yvonne T Floyd | | | |
| Immigrant Defense Clinic | LAW-LW 10660 | 3.0 | A |
| Instructor: Jojo Annobil<br>Yvonne T Floyd | | | |
| Examining Disability Rights and Centering Disability Justice | LAW-LW 10983 | 2.0 | A |
| Instructor: Prianka Nair | | | |
| Professional Responsibility and the Regulation of Lawyers | LAW-LW 11479 | 2.0 | A |
| Instructor: Sheldon Andrew Evans | | | |
| Property | LAW-LW 11783 | 4.0 | A- |
| Instructor: David Jerome Reiss | | | |

| | AHRS | EHRS |
|---|---|---|
| Current | 15.0 | 15.0 |
| Cumulative | 57.0 | 57.0 |

Staff Editor - Review of Law & Social Change 2022-2023

**End of School of Law Record**

## TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW
## JD CLASS OF 2023 AND LATER & LLM STUDENTS

*I certify that this is a true and accurate representation of my NYU School of Law transcript.*

Grading Guidelines

Grading guidelines for JD and LLM students were adopted by the faculty effective fall 2008. These guidelines represented the faculty's collective judgment that ordinarily the distribution of grades in any course will be within the limits suggested. An A + grade was also added.

Effective fall 2020, the first-year J.D. grading curve has been amended to remove the previous requirement of a mandatory percentage of B minus grades. B minus grades are now permitted in the J.D. first year at 0-8% but are no longer required. This change in the grading curve was proposed by the SBA and then endorsed by the Executive Committee and adopted by the faculty. Grades for JD and LLM students in upper-level courses continue to be governed by a discretionary curve in which B minus grades are permitted at 4-11% (target 7-8%).

| **First-Year JD (Mandatory)** | **All other JD and LLM (Non-Mandatory)** |
|---|---|
| A+: 0-2% (target = 1%) (see note 1 below) | A+: 0-2% (target = 1%) (see note 1 below) |
| A: 7-13% (target = 10%) | A: 7-13% (target = 10%) |
| A-: 16-24% (target = 20%) | A-: 16-24% (target = 20%) |
| ***Maximum for A tier = 31%*** | ***Maximum for A tier = 31%*** |
| B+: 22-30% (target = 26%) | B+: 22-30% (target = 26%) |
| ***Maximum grades above B = 57%*** | ***Maximum grades above B = 57%*** |
| B: remainder | B: remainder |
| B-: 0-8%* | B-: 4-11% (target = 7-8%) |
| C/D/F: 0-5% | C/D/F: 0-5% |

The guidelines for first-year JD courses are mandatory and binding on faculty members; again noting that a mandatory percentage of B minus grades are no longer required. In addition, the guidelines with respect to the A+ grade are mandatory in all courses. In all other cases, the guidelines are only advisory.

With the exception of the A+ rules, the guidelines do not apply at all to seminar courses, defined for this purpose to mean any course in which there are fewer than 28 students.

In classes in which credit/fail grades are permitted, these percentages should be calculated only using students taking the course for a letter grade. If there are fewer than 28 students taking the course for a letter grade, the guidelines do not apply.

Important Notes

1. The cap on the A+ grade is mandatory for all courses. However, at least one A+ can be awarded in any course. These rules apply even in courses, such as seminars, where fewer than 28 students are enrolled.
2. The percentages above are based on the number of individual grades given – not a raw percentage of the total number of students in the class.
3. Normal statistical rounding rules apply for all purposes, so that percentages will be rounded up if they are above .5, and down if they are .5 or below. This means that, for example, in a typical first-year class of 89 students, 2 A+ grades could be awarded.
4. As of fall 2020, there is no mandatory percentage of B minus grades for first-year classes.

NYU School of Law does not rank students and does not maintain records of cumulative averages for its students. For the specific purpose of awarding scholastic honors, however, unofficial cumulative averages are calculated by the Office of Records and Registration. The Office is specifically precluded by faculty rule from publishing averages and no record will appear upon any transcript issued. The Office of Records and Registration may not verify the results of a student's endeavor to define his or her own cumulative average or class rank to prospective employers.

Scholastic honors for JD candidates are as follows:

| | |
|---|---|
| ***Pomeroy Scholar:*** | Top ten students in the class after two semesters |
| ***Butler Scholar:*** | Top ten students in the class after four semesters |
| ***Florence Allen Scholar:*** | Top 10% of the class after four semesters |
| ***Robert McKay Scholar:*** | Top 25% of the class after four semesters |

Named scholar designations are not available to JD students who transferred to NYU School of Law in their second year, nor to LLM students.

Missing Grades

A transcript may be missing one or more grades for a variety of reasons, including: (1) the transcript was printed prior to a grade-submission deadline; (2) the student has made prior arrangements with the faculty member to submit work later than the end of the semester in which the course is given; and (3) late submission of a grade. Please note that an In Progress (IP) grade may denote the fact that the student is completing a long-term research project in conjunction with this class. NYU School of Law requires students to complete a Substantial Writing paper for the JD degree. Many students, under the supervision of their faculty member, spend more than one semester working on the paper. For students who have received permission to work on the paper beyond the semester in which the registration occurs, a grade of IP is noted to reflect that the paper is in progress. Employers desiring more information about a missing grade may contact the Office of Records & Registration (212-998-6040).

Class Profile

The admissions process is highly selective and seeks to enroll candidates of exceptional ability. The Committees on JD and Graduate Admissions make decisions after considering all the information in an application. There are no combination of grades and scores that assure admission or denial. For the JD Class entering in Fall 2021 (the most recent entering class), the 75th/25th percentiles for LSAT and GPA were 174/170 and 3.93/3.73.

**Updated: 10/4/2021**

NYU LAW

ADAM B. COX
*Robert A. Kindler Professor of Law*

New York University School of Law
40 Washington Square South, 509
New York, NY 10012-1099
212 992 8875
adambcox@nyu.edu

June 5, 2023

Dear Judge:

I write to warmly recommend Natasha Menon for a clerkship in your chambers.

By way of background, I am a professor of law at NYU School of Law, where I teach and write about constitutional law, immigration law, and voting rights, among other subjects. Before joining NYU's faculty I taught at the University of Chicago, and I began my legal career as a civil rights lawyer working for the American Civil Liberties Union.

I first got to know Natasha last spring when she was my student in Legislation and the Regulatory State (LRS), a required first-year course at NYU that introduces students to administrative law and statutory interpretation. Natasha was a standout in our class discussions, and her strong performance there—combined with the really compelling work she had done in grad school on the treatment of unaccompanied minors at the U.S.-Mexico border—led me to hire her last summer to work with me as a research assistant.

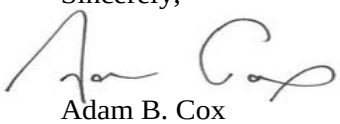
Natasha has been a fantastic research assistant. While working full time at NYLAG, she somehow made the time to research and write an incredibly comprehensive memo about the role of race and racism in American administrative law. The memo was a model of organization and clarity, and Natasha's characteristic thoughtfulness shone through in it. Moreover, her careful, detail-oriented approach to the research generated an important insight about the way that scholars over the last generation have discussed (or, in this particular instance, have not discussed) the role of race in administrative law—an insight that informed parts of a project that was recently published by the *Yale Law Journal*.

Natasha also has a tremendous commitment to public service. Her dedication to immigrant's rights issues, which was apparent from our earliest conversations last year and was reflected in her work before coming to law school, was part of what led me to hire her as a research assistant. As I've gotten to know her better, I've only grown more impressed. Whether through her leadership in the law school's South Asian Law Students Association or the Women of Color Collective, her research support this past fall for the National Center for Youth Law, or her upcoming summer internship at the NAACP Legal Defense Fund, Natasha is always working tirelessly to make a difference, in communities both big and small.

Last, but definitely not least, Natasha has been a pleasure to work with both in and out of class. Whether we are dissecting cases in class, talking through a thorny research problem, or chatting about her career trajectory, Natasha always has the same generous spirit, direct approach, and good nature that I know will serve her well both in her clerkship and well beyond.

Please let me know if there is any additional information I can provide. I can be reached at work or on my mobile phone at (917) 407-8282.

Sincerely,



Adam B. Cox

centerforconstitutionalrights

June 12, 2023

**RE: Natasha Menon, NYU Law '24**

Your Honor:

I am the Legal Director of the Center for Constitutional Rights (CCR), where I supervise work our work related to racial justice, prisoners' rights, immigrants' rights, LGBTQI+ rights, and rights of Guantanamo detainees and victims of torture. Prior to this position, I was a tenured law professor at Seton Hall Law School, where I taught Constitutional Law for ten years and directed a Constitutional Law Clinic. I am currently an Adjunct Professor at NYU and Yale Law Schools, where I teach courses on Civil Rights Law. I clerked, many moons ago, for the late, Honorable Dolores K. Sloviter, then-Chief Judge of the Third Circuit Court of Appeals. I write to highly recommend Natasha Menon for a clerkship in your chambers.

Natasha was an outstanding student in a four-credit Civil Rights Law course I taught at NYU in the Fall 2022. It is a doctrinal course covering the theory and practice of Section 1983, Bivens, immunities and defenses for state, municipal and federal actors, modes of liability under Monell, other Reconstruction-era civil rights statutes (1981, 1982, 1985(3)), modern civil rights statutes (Title VII, FHA) and standing and damages. It is material, I dare say, that would be quite useful for a law clerk to have mastered. Natasha was always deeply prepared and when on call in two instances reflected a detailed and sophisticated understanding of the doctrinal material as presented in a court opinion. She consistently asked sharp questions revealing an obviously quick analytical mind, but also a broad one, particularly insofar as she was eager and able to draw connections and critique across doctrinal issue areas.

In spite of the strict NYU curve, Natasha received an "A-" in the course based on a five-hour exam. I looked back at her exam which was very strong – her analysis was superior and her writing clear and organized. The course also included pedagogy reflecting critiques of public interest/impact litigation and focused on a mode of social-change lawyering I sometimes referred to as movement lawyering. Natasha took a deep interest in offerings about how to make the practice of lawyering more accountable and effective for marginalized communities seeking redress for injustice – her passion.

Natasha is one of the most committed public interest students and also one of most strongly-drawn to clerking that I have encountered at NYU. She is eager to continue to hone

666 broadway, 7 fl, new york, ny 10012
t 212 614 6464 f 212 614 6499 www.CCRjustice.org

her legal-analytical skills, and to do so in the context of a challenging environment with mentorship from judges and co-clerks. Given her deep intellectual proclivity and commitment to learning and practice, I am most confident she will make a very strong law clerk. Natasha is also curious, warm, deeply respectful and kind; I think she will also make a delightful contribution to chambers.

I urge you to give her strong consideration. If you have any questions or concerns, please feel free to contact me directly at 212.614.6427 or bazmy@ccrjustice.org.

Very truly yours,

*/s/ Baher Azmy*

Baher Azmy

National Center for Youth Law

1212 Broadway Street, Suite 600,
Oakland, CA 94612-2701 |
510.835.8098 tel | 510.835-8099 fax
**info@youthlaw.org |**
**www.youthlaw.org**

Nina Monfredo
nmonfredo@youthlaw.org
(917) 502-7824

May 22, 2023

Dear Judge,

I am writing to enthusiastically recommend Natasha Menon, a 2L at New York University School of Law, for a clerkship in your chambers. I am a Staff Attorney at the National Center for Youth Law ("NCYL"), where I focus on impact litigation to improve and transform systems that serve children and youth. I had the privilege of supervising Natasha when she was an intern at NCYL in the fall of 2022. As is clear from Natasha's resume, she is incredibly committed to pursuing a career in public interest litigation. Natasha is particularly interested in impact litigation that is deeply informed by community and movement lawyering. Natasha wants to clerk because she wants to spend a year researching and writing intensively, and because she wants to learn how a judge thinks through the decisions they make and what kinds of arguments are most compelling or persuasive.

Natasha is the strongest legal intern I have supervised during my time at NCYL. First and foremost, Natasha has excellent research and writing skills. She wrote several memos analyzing claims in active and potential litigation, including regarding potential statutory and constitutional claims on behalf of students who receive municipal citations for conduct occurring at school, as well as analyzing municipal liability in a case challenging the unconstitutional use of involuntary psychiatric examinations. Natasha's memos needed remarkably little editing for something written by a law student. When I or other lawyers on the team had comments or follow-up questions about her research, Natasha was receptive to feedback and effectively incorporated it. She also did extensive, detail-oriented work helping to finalize two different expert reports. Her analytical and intellectual abilities are excellent. The subject area and legal issues Natasha worked on at NCYL were relatively new to her; she delved into learning them with gusto and got quickly up to speed. During case team meetings, Natasha gave extremely clear, poised oral presentations and helped us think through thorny legal issues.

Natasha did an impressive job of balancing her part-time internship at NCYL with a rigorous course schedule and demanding extracurricular commitments. She was extremely communicative regarding her progress on longer-term assignments and always turned in assignments on time. Natasha is also a phenomenal team player and all-around wonderful person. As a former clerk to the Honorable Gregory Woods of the United States District Court

for the Southern District of New York, I am acutely aware of how small chambers is and how important the team dynamic is. I am confident that Natasha would be an asset to any chambers. She is incredibly mature and handles with competence, grace, and poise stressful situations that might overwhelm other law students.

I cannot recommend Natasha highly enough. Please do not hesitate to reach out if you have any questions or if there is any additional information I can provide.

Sincerely,

Nina Monfredo

Nina Monfredo

## Writing Sample

Enclosed please find a mock memorandum of law in support of a Motion to Dismiss I prepared for my 1L Lawyering class. The case involved two issues: (1) whether a location was considered a public forum and (2) whether there should be a criminal charge of harassment. The citations in this motion follow citing conventions of the Blue Book. While my professor provided preliminary structural feedback to this draft, it does not include detailed line-by-line edits from her. I have since made edits to the draft myself.

**HAMPTON COUNTY, STATE OF NEW JERSEY**
**BRENNAN TOWNSHIP MUNICIPAL COURT**

| | |
|---|---|
| STATE OF NEW JERSEY,<br><br>v.<br><br>WILLIAM STEWART,<br><br>*Defendant*. | Docket No. 22-S-0207<br><br>Judge Gil Feder<br><br>Hearing Date: April 6, 2022<br>Hearing Time: 5:30 P.M. |

**DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS**

Natasha Menon
Natasha Menon (State Bar No. 10138)
Assistant Municipal Public Defender
Brennan Township, New Jersey

Dated: April 1, 2022
Brennan Township, New Jersey

TO: Sammy Burton
Assistant Municipal Prosecutor
Brennan Township, New Jersey

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## PRELIMINARY STATEMENT

The State of New Jersey is choosing to prosecute a teenager for fundraising for new uniforms for his basketball team in a public space. What would have ordinarily been merely an interaction between two Brennan residents escalated to an entanglement with the criminal legal system at the hands of Officer Annabel Smith. The State claims that William Stewart is guilty of disorderly conduct and harassment, yet the facts do not support such allegations.

Mr. Stewart was standing in a public forum when he encountered Ms. Robbins and simply chose to exercise his constitutionally protected right of free speech. Mr. Stewart had no intention to harass Ms. Robbins and instead asked her from afar to support his fundraising efforts. However, Officer Smith chose to get involved and changed the nature of the interaction. Rather than support Mr. Stewart in participating in community-based activities that keep him out of trouble, the State is asking the Court to introduce him to a system that could forever negatively impact his trajectory in life. To de-escalate what was an ordinary interaction between two denizens, the Court should dismiss both the charges of disorderly conduct and harassment.

## STATEMENT OF FACTS

### I. Interactions Between Mr. Stewart and Ms. Robbins

William Stewart is an eighteen-year-old boy who is 5-feet-2-inches tall. Police Rep. 1. He is a member of the Brennan Community Center basketball team and was collecting funds for new uniforms at the Cavanaugh Plaza because there are many pedestrians that pass through. Police Rep. 2.

Millie Robbins is fifty-two years old and an employee of Connor's Hardware Store. Compl. ¶ 1-2. Twice a week, she withdraws $40 from the ATM at the East Brennan Savings Bank located at 3 Cavanaugh Plaza. Compl. ¶ 4.

Mr. Stewart had politely asked for donations from Ms. Robbins in the past with slogans, including "I know you have the dollars, now help some basket ballers." Ms. Robbins ignored these requests. *Id.* at 6. On January 24, 2022, when Mr. Stewart asked Ms. Robbins for a donation, she explicitly declined for the first time. He responded by stating "Thanks a lot, Miss One Percent. I see you looking at me and I won't forget!" *Id.* at 7. On January 27, 2022, Mr. Stewart held out his hands for a donation as Ms. Robbins walked into the bank and said "Scrooge!" as she exited the bank. *Id.* at 8. Mr. Stewart chanted "Scrooge" on January 31, 2022, as Ms. Robbins entered the bank and continued until she was out of earshot. *Id.* at 9.

On February 3, 2022, at approximately 8:40 a.m., Officer Smith was patrolling Cavanaugh Plaza and observed Mr. Stewart and Ms. Robbins arguing outside of the East Brennan Savings Bank. Police Rep. 2. The argument began after Ms. Robbins told Mr. Stewart to "get a job." *Id.* Both parties were standing approximately seven feet apart and were wearing medical masks. *Id.* Officer Smith told Mr. Stewart that panhandling violated the Cavanaugh Plaza rules and that he either needed to stop soliciting funds or leave. *Id.* After Mr. Stewart refused, he was charged with harassment in violation of N.J. Stat Ann. § 2C:33-4 (a), as well as disorderly conduct in violation of Brennan, N.J., Rev. Ordinances tit. 17 § 120.08. *Id.*

## II. Cavanaugh Plaza

In 2017, the Cavanaugh Plaza Chamber of Commerce ("CPCC") submitted a street improvement application to the New Jersey Department of Transportation regarding what would become the site of Mr. Stewart and Ms. Robbins's altercation. Form MT-158, N.J. DOT Street Improvement Application 1 (hereinafter "Application"). What is now Cavanaugh Plaza was previously the southernmost blocks of Concord Avenue, between Grand Street and the Municipal Library Building. *Id.* at 2. The Municipal Library Building has a secondary entrance

at the back. *Id.* This street, which is located in the heart of the Brennan Township Shopping District, is still owned by the Township of Brennan but is managed by CPCC. *Id.* at 3. The renovation consisted of elevating the street to make it level with the sidewalk, repaving the area with antique brick, as well as installing benches, trees, trash receptacles, and two small fountains. *Id.* at 2. The renovation was completed in 2019. First Appearance Hr'g Tr. 4:15 (hereinafter "Tr."). The renovation plans also included the introduction of public art and sculptures, as well as making the plaza available for free concerts and festivals. Application 3.

### III. Procedural History

The complaint was filed by Officer Smith on behalf of the State of New Jersey on February 3, 2022. Compl. 1. Mr. Stewart's arraignment was held on February 9, 2022, where he pled not guilty to both charges. Tr. 2:20-21. The Defense moved to dismiss the charges by arguing: 1) the State should dismiss the charge of disorderly conduct against Mr. Stewart because his conduct was protected by the First Amendment as it took place in a public forum, and 2) the facts as alleged do not make out the elements of the charge of harassment. Arraignment. Tr. 3:1-2; *Id.* at 8:5-7. The court ordered both parties to prepare briefings on the two legal issues at hand. Tr. 8:15-16.

## ARGUMENT

Mr. Stewart moves to dismiss the Complaint pursuant to N.J.R.R. 3:10-2(d). The Court should dismiss the State's allegation of Mr. Stewart's disorderly conduct in violation of Brennan, N.J., Rev. Ordinances tit. 17 § 120.08 because Cavanaugh Plaza is a traditional public forum, meaning Mr. Stewart's expressive activity is protected under the First Amendment. Even if the disorderly conduct charge is upheld, the Court should dismiss the harassment charge in violation of N.J. Stat Ann. § 2C:33-4 (a). The State failed to allege a cause of action. Mr. Stewart had no

intention to harass Ms. Robbins, nor did he cause her annoyance or alarm. Thus, the Court should dismiss the Complaint.

## I. Cavanaugh Plaza is a Traditional Public Forum

The charge of disorderly conduct against Mr. Stewart should be dismissed because Cavanaugh Plaza is a traditional public forum. There are three different types of forums recognized under the First Amendment: a traditional public forum, a public forum created by government designation, and a nonpublic forum. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 53 (1983). If Cavanaugh Plaza is classified as a traditional public forum, then Mr. Stewart's efforts to raise funds would be protected under the First Amendment. *Vill. Of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 644 (1980) (holding that panhandling is considered protected expressive activity under the First Amendment). To determine the type of forum in question, the historical use and purpose, as well as the physical characteristics of Cavanaugh Plaza must be evaluated. *See United States v. Marcavage*, 609 F.3d 264, 276-277 (3d. Cir. 2010).

### A. Cavanaugh Plaza is a traditional public forum because of its historical use and its current purpose

A traditional public forum is a gathering place "which ha[s] immemorially been held in trust for the use of the public and . . . ha[s] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939). The exemplars of traditional public fora are public streets, sidewalks, and parks. *Warren v. Fairfax Cnty.*, 196 F.3d 186, 190 (4th Cir. 1999). Cavanaugh Plaza was originally two blocks of Concord Avenue, a public thoroughfare located in the heart of the Brennan Township. Application 2. Even if a publicly owned thoroughfare is managed by a private entity, it is still

considered a traditional public forum. *ACLU of Nev. v. City of Las Vegas*, 333 F.3d 1092, 1095 (9th Cir. 2003) (holding that even though the City of Las Vegas entered a relationship with a private contractor to beautify Fremont Street and create an entertainment space, it was still a traditional public forum, as it continued "to play its old role as a public thoroughfare"). *See also Capitol Sq. Rev. & Adv. Bd. v. Pinette*, 515 U.S. 753, 757 (1995). Similarly, while the Township of Brennan contracted out the management of Cavanaugh Plaza to the CPCC, the purpose of the forum as a public thoroughfare has not changed. The space was a traditional public forum when it was Concord Avenue, and it continues to be a traditional public forum as Cavanaugh Plaza.

However, the prosecution may argue that not all streets are considered public thoroughfares. The plaza of the Lincoln Center complex in New York City was considered "a special type of enclave," where the ability of pedestrians to pass through was merely incidental to its main purpose. *Hotel Emp. & Rest. Emp. Union (H.E.R.E.) v. Dep't of Parks & Recreation*, 311 F.3d 534, 550. (2d Cir. 2002). *See also U.S. v. Kokinda*, 497 U.S. 720, 725 (1990) (holding that the sidewalk was a nonpublic forum because its central purpose was providing a pathway to the post office). In this case, Cavanaugh Plaza ends at the entryway of the Municipal Public Library. Application 2. However, unlike in *H.E.R.E.*, the central focus of Cavanaugh Plaza is not the Municipal Library (which has a second entrance not located in the plaza), but rather the plaza itself and the various businesses that make up the Brennan Township Shopping District. Application 2. The plaza is indeed touted to host "public art and sculptures" and is "made avaliable for free concerts and festivals," indicating that it is meant to attract greater foot traffic within the Plaza, not merely as a pathway to the Library. *Id*.

Also integral to determining a traditional public forum is its compatibility with expressive activity. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985). There are

cases in which a forum is government-owned, but its objective use is not determined to be compatible with expressive activity. *See United States v. Grace*, 461 U.S. 171, 178 (1983). In *Cornelius*, for example, government-owned property used to solicit donations from federal employees for specific charitable organizations was not considered a traditional public forum because the government did not intend for the forum to be utilized by other charities to seek funding. *Cornelius*, 473 U.S. at 798; *see also H.E.R.E.*, 311 F.3d at 551 (noting that plazas that have been "forecourts in performing arts complexes" have not been traditionally dedicated to expressive uses). However, expressive activities are considered to be especially compatible with "spaces dedicated to general pedestrian passage." *First Unitarian Church of Salt Lake City v. Salt Lake City Corp*., 308 F.3d 1114, 1128 (10th Cir. 2002). In this case, the objective use of Cavanaugh Plaza as a public thoroughfare is clearly compatible with expressive activity, which is another reason why it is a traditional public forum.

**B. The physical characteristics of Cavanaugh Plaza match those of a traditional public forum.**

The classification of a traditional public forum requires evaluating its physical characteristics, "including its location and the existence of clear boundaries delimiting the area." *ACLU of Nev*, 333 F.3d at 1102. Unless the forum includes barriers that distniguish the forum from surrounding public fora, it is also considered a public forum. *Venetian Casino Resort, L.L.C. v. Loc. Joint Exec. Bd. Of Las Vegas, 257 F.3d 937, 945* (9th Cir. 2001). In *Marcavage*, the sidewalk in question was made of Belgian block, which was distinguishable from the surrounding sidewalks. However, the Third Circuit held that "unique construction material underfoot . . . would not necessarily put an individual on notice that he was suddenly treading on a different sort of government property where expressive activity was disallowed." *Marcavage*,

609 F.3d at 276. *See also ACLU of Nev.*, 333 F.3d at 1103 (holding that decorative pavement, barriers to cars, and a canopy did not change the legal status of a public forum).

The street improvement efforts for Cavanaugh Plaza included elevating the street level by six inches, repaving the area with antique brick, as well as installing benches, trees, fountaints and bollards. Application 2. However, these improvements in paving and landscaping are the exact type of cosmetic differences that would not significantly change the nature of the forum. Thus, while Cavanaugh Plaza may have changed some superficial features of the forum, it still has the core physical characteristics that make it inherently a traditional public forum.

Overall, it is clear that when looking at the historial use, current purpose, and physical charateristics of Cavanaugh Plaza, the Court can only conclude that the location is a public forum.

## II. The State Failed to Establish a Harassment Claim Against Mr. Stewart

In order for the State to prevail in the charge of harassment against Mr. Stewart in violation of N.J. Stat Ann. § 2C:33-4 (a), the facts alleged must make out a cause of action. If the facts do not make out the offense charged, the charge must be dismissed. *State v. Newell*, 378 A.2d 47, 50 (N.J. Super. Ct. App. Div. 1977). The Court should dismiss the harassment charges against Mr. Stewart, as the facts alleged are not sufficient to make a legal claim of harassment. In order to establish a claim of harassment in the State of New Jersey, three elements are required: (1) the defendant made a communication; (2) the defendant's purpose in making the communication was to harass another person; and (3) the communication was in a manner likely to cause annoyance or alarm to its intended recipient. *State v. Hoffman*, 695 A. 2d 236, 242 (N.J. 1997).

### A. Mr. Stewart made a communication

The first element of the charge of harassment is that the defendant made a communication, which is true in the case of Mr. Stewart. *Hoffman*, 695 A. 2d at 242. He exchanged words with Ms. Robbins, as observed by Officer Smith. Police Rep. 2.

**B. Mr. Stewart had no purpose to harass**

While Mr. Stewart did make a communication, he did not have any intention of harassing Ms. Robbins. Integral to establishing a case of harassment is establishing "the element of purpose to harass." *E.K. v. G.K.*, 575 A.2d 883, 884 (N.J. Super. Ct. App. Div. 1990). Acting "with purpose" is the highest form of *mens rea* in the penal code of the State of New Jersey and requires that a person acts purposely in that "it is his conscious object to engage in conduct of that nature." *State v. Duncan*, 870 A.2d 307, 312 (N.J. Super. Ct. App. Div. 2005). The intent to harass cannot be inferred from mere knowledge that the actions could be cause for alarm or annoyance. *See State v. Fuchs*, 553 A.2d 853, 857 (N.J. Super. Ct. App. Div. 1989). There is a high bar for alleged facts to establish the purpose to harass, especially if the defendant has an alternative purpose to his conduct that is legitimate. *See, e.g., State v. Long*, 630 A.2d 430, 431 (N.J. Super. Ct. App. Div. 1993) (holding that the defendant calling the complainant's landlord and sitting outside of her residence on several occasions did not establish a purpose to harass, because there was an alternative legitimate purpose of debt collection).

The State would not be able to prove a *mens rea* of a specific purpose to harass in the case of Mr. Stewart based on the facts alleged. It is clear that it was not the conscious objective of Mr. Stewart to harass Ms. Robbins. Even if the State can prove that Mr. Stewart knew that his behavior could annoy Ms. Robbins, his alternative legitimate purpose for communicating with her was to raise funds for new uniforms for his community basketball team.

**C. Mr. Stewart did not communicate in a manner likely to cause annoyance or alarm**

The determination of annoyance or alarm must be through showing that a reasonable person, having the same history as that of the victim, would be annoyed or alarmed by the defendant's communication, rather than determining the annoyance felt by the victim themselves. *Cesare v. Cesare*, 713 A.2d 390, 394 (N.J. 1998). N.J. Stat Ann. § 2C:33-4 (a) has been used most often in domestic violence cases, in which the relationship between the perpetrator and victim colors the standard used to determine if the communication constitutes harassment. *See Hoffman*, 149 N.J. at 584 (noting that for victims of domestic violence, the standard for annoyance is lower).

**a. Mr. Stewart did not make any anonymous communications**

A communication under N.J. Stat Ann. § 2C:33-4 (a) would be considered anonymous if the defendant had not made themselves known to the recipient. *See Duncan*, 870 A.2d at 311 (noting that the defedandant's communication would have been anonymous because he called from a pay phone and did not identify himself, if not for the police officer who watched him make the call).

In this case, Mr. Stewart was clearly identifiable to Ms. Robbins, as they were facing each other and only standing seven feet apart. Police Rep. 2. Mr. Stewart did not attempt to hide his identity, so this communication was not anonymous.

**b. Mr. Stewart did not communicate with Ms. Robbins at extremely inconvenient hours**

A communication under N.J. Stat Ann. § 2C:33-4 (a) that is made at an extremely inconvenient hour would likely take place during the recipients' working hours or late at night. *See e.g. State v. Finance American Corp*., 440 A.2d 28, 198 (N.J. Super. 1981) (noting that the defendant continuously calling the recipient while she was at work constituted extremely inconvenient hours).

Mr. Stewart's encounter with Ms. Robbins occurred at in the morning at approximately 8:40 am, when Ms. Robbins was not at her place of employment. Police Rep. 2.

**c. Mr. Stewart did not use any offensively coarse language**

"Offensively coarse language" is a high bar. *See, e.g., Chernesky v. Fedorczyk*, 786 A.2d 881, 884 *(N.J. Super. Ct. App. Div. 2001)* (explaining that a dispute in which "vulgarities on numerous occasions and inappropriate expressions of anger [were used]. . . is not harassment"); *Duncan*, 870 A.2d at 312 (holding that even though the defendant used profanity, it was not enough to establish an intent to harass). The context of the communication also matters. *Id.* at 309 (noting that statements made that could be considered "impolite and rude," but were made while venting frustation, were not considered offensively coarse).

Mr. Stewart's use of the word "Scrooge" can hardly be seen as rising to the level of "vulgarities" or "profanity," which is why the communication does not fall into this category. Moreover, Mr. Stewart was impliedly venting his frustration at failing to collect donations for his basketball team, which would go to the context informing his communication.

**d. Mr. Stewart did not communicate in any other manner likely to cause annoyance or alarm**

The manner in which a communication creates any other kind of annoyance or alarm is limited by the Constitution. In *State v. Burkert*, the New Jersey Supreme Court restricted the communications that fall into this definition to encompassing "only those modes of communicative harassment that 'are also invasive of the recipient's privacy,' and that constitute threats to safety." 174 A.3d 987, 999 (N.J. 2017). The Court should consider the "totality of the parties' historical circumstances." *Hoffman,* 695 A.2d at 247.

Courts are less likely to uphold a harassment claim on invasion of privacy in a public place. *Compare State v. L.C.*, 662 A.2d 577, 580 (N.J. Super. Ct. App. Div. 1995) (explaining

that the defendant yelling in the parking lot of a school was not harassment because his right to give his opinion in a public space was constitutionally protected) *with Pazienza v. Camrata*, 885 A.2d 455, 458 (N.J. Super. Ct. App. Div. 2005) (holding that the defendant invaded the privacy of his former partner when he peered into the window of her home and texted her about what he saw her watching on TV).

While Mr. Stewart had interacted with Ms. Robbins in previous occasions, it never escalated past mere comments to each other. Mr. Stewart did not invade Ms. Robbins' privacy, as he approached her in a public area and stood several feet away from her. When she declined his solicitation, he did not continue to follow her. Police Rep. 2. Additionally, since they were in a public place, it is less likely that the communication would be seen as an invasion of privacy.

While N.J. Stat Ann. § 2C:33-4 (a) has traditionally been applied to cases of domestic abuse, harassment charges have also been upheld when determined to be racially offensive. *See State v. Mortimer*, 641 A.2d 257, 261 (1994) (holding that racially offensive graffiti written on the victim's home was harassment).

The communications of Mr. Stewart could not be classified as a threat to safety, as it is neither in the context of domestic violence, nor did Mr. Stewart use any racially offensive language. Moreover, Ms. Robbins did not indicate that she feared for her safety in light of Mr. Stewarts statements of frustration. Mr. Stewart's communications neither constituted an invasion of privacy nor a threat to safety, thus, he did not communicate in any other manner likely to cause annoyance or alarm.

It is clear that the State has not made out a charge of harassment from the facts alleged and the Court should dismiss the claim of harassment in violation of N.J. Stat Ann. § 2C:33-4 (a).

## CONCLUSION

The Court should dimiss the Complaint pursuant to N.J.R.R. 3:10- 2(d) for two reasons. First, the State's allegation of Mr. Stewart's disorderly conduct in violation of Brennan, N.J., Rev. Ordinances tit. 17 § 120.08 must be dropped, as Cavanaugh Plaza is a public forum. Since the Plaza has the historical use, current purpose, and physical characteristics of a traditional public forum, Mr. Stewart's fundraising efforts are constitutionally protected. Second, the charge of harassment in violation of N.J. Stat Ann. § 2C:33-4 (a) does not hold up in light of the alleged facts. Mr. Stewart did not make any communications that were in a manner that would cause annoyance or alarm, nor did he purposefully attempt to harass Ms. Robbins. Therefore, Mr. Stewart asks the Court to dismiss the Complaint.

## Applicant Details

| | |
|---|---|
| First Name | **Grayson** |
| Last Name | **Metzger** |
| Citizenship Status | **U. S. Citizen** |
| Email Address | **gmmetzge@umich.edu** |
| Address | **Address**<br>Street<br>**618 S. Main St. Apt. 602**<br>City<br>**Ann Arbor**<br>State/Territory<br>**Michigan**<br>Zip<br>**48104** |
| Contact Phone Number | **443-977-0412** |

## Applicant Education

| | |
|---|---|
| BA/BS From | **Brown University** |
| Date of BA/BS | **May 2018** |
| JD/LLB From | **The University of Michigan Law School**<br>**http://www.law.umich.edu/currentstudents/careerservices** |
| Date of JD/LLB | **May 6, 2024** |
| Class Rank | **School does not rank** |
| Law Review/Journal | **Yes** |
| Journal(s) | **Michigan Law Review** |
| Moot Court Experience | **No** |

## Bar Admission

## Prior Judicial Experience

| | |
|---|---|
| Judicial Internships/ Externships | **No** |
| Post-graduate Judicial Law Clerk | **No** |

## Specialized Work Experience

## Recommenders

Caminker, Evan
caminker@umich.edu
734-764-5221
Floyd, Carrie
cfloyd@umich.edu

**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

June 03, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am a rising third-year student at the University of Michigan Law School and I am writing to apply for a clerkship in your chambers for the 2024–2025 term.

As a former Division I athlete, I thrive in collaborative environments where I am constantly honing my craft. I am excited by the fact that clerking presents the opportunity to refine my legal writing, as well as the opportunity to contribute to and learn from the flow of ideas on a range of legal issues.

I have attached my resume, law school transcript, and a writing sample for your review. Letters of recommendations from the following professors are also attached:

- Professor Barbara McQuade: bmcquade@umich.edu, (734) 763-3183
- Professor Evan Caminker: caminker@umich.edu, (734) 763-5221
- Professor Carrie Floyd: cfloyd@umich.edu, (734) 763-7211

Thank you for your time and consideration.

Respectfully,

Grayson Metzger

# Grayson Metzger

(443) 977-0412 • gmmetzge@umich.edu • she/her/hers

## EDUCATION

**University of Michigan Law School** — Ann Arbor, MI
*Juris Doctor* GPA 3.792 — Expected May 2024
Journal: Michigan Law Review, *Senior Editor*
Activities: Oral Advocacy Competition, *Problem Design Team*
Property Tax Appeals Project, *Student Advocate*
Invited to serve on the Campbell Moot Court Executive Board 2023–2024

**Brown University** — Providence, RI
*Bachelor of Arts* in International Relations — May 2018
Honors: Phi Beta Kappa; 4x NFCA Scholar-Athlete
Activities: Varsity Softball, NCAA Division I

## EXPERIENCE

**New Hampshire Public Defender** — Manchester, NH
*Legal Intern—Eligible for student practice under N.H.R. Sup. Ct. 36* — Summer 2023

**Veterans Legal Clinic** — Ann Arbor, MI
*Student Attorney* — Fall 2022
- Drafted a trial brief and jury instructions for a termination of tenancy case in which there was a question regarding the application of federal law to a former public housing project
- Drafted a motion to modify parenting time and child support; drafted complaint for a consumer fraud case
- Discussed case strategy and expectations with clients; engaged in settlement negotiations

**Mecklenburg County Public Defender** — Charlotte, NC
*Legal Intern* — May 2022 – August 2022
- Interviewed clients, reviewed video evidence, and drafted plea negotiation letters to ADAs sharing client stories and explaining mitigating factors
- Prepared internal discovery and legal research memoranda on Fourth Amendment suppression issues for drug trafficking, property, and concealed weapons cases

**Public Relay** — Tysons Corner, VA/Remote
*Media Analyst* — Dec. 2019 – June 2021
- Analyzed print, social, and broadcast media to identify trends in various markets and provide clients with detailed updates of their media coverage

**Rebuilding Together DC Alexandria** — Alexandria, VA/Washington, D.C.
*AmeriCorps Project Coordinator* — Jan. 2019 – Dec. 2019
- Conducted 50+ home visits and developed preliminary work scopes for senior and low-income DC homeowners in need of no-cost home repairs
- Discussed repair priorities with clients and advocated for funding to be allocated to meet client needs

## ADDITIONAL

- Former Division I athlete looking to bring a growth mindset and discipline to a new team environment
- **Interests:** writing poetry, pickleball, weekend hikes to look for wildflowers

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# The University of Michigan Law School

## Cumulative Grade Report and Academic Record

**Name:** Metzger,Grayson M
**Student#:** 12834719

University Registrar

| Subject | Course Number | Section Number | Course Title | Instructor | Load Hours | Graded Hours | Credit Towards Program | Grade |
|---|---|---|---|---|---|---|---|---|
| **Fall 2021** | **(August 30, 2021 To December 17, 2021)** | | | | | | | |
| LAW | 510 | 001 | Civil Procedure | Nicholas Bagley | 4.00 | 4.00 | 4.00 | A |
| LAW | 520 | 002 | Contracts | Daniel Crane | 4.00 | 4.00 | 4.00 | A |
| LAW | 580 | 001 | Torts | Roseanna Sommers | 4.00 | 4.00 | 4.00 | A- |
| LAW | 593 | 004 | Legal Practice Skills I | Mark Osbeck he-him-his | 2.00 | | 2.00 | H |
| LAW | 598 | 004 | Legal Pract:Writing & Analysis | Mark Osbeck he-him-his | 1.00 | | 1.00 | H |
| **Term Total** | | | | **GPA: 3.900** | **15.00** | **12.00** | **15.00** | |
| **Cumulative Total** | | | | **GPA: 3.900** | | **12.00** | **15.00** | |
| **Winter 2022** | **(January 12, 2022 To May 05, 2022)** | | | | | | | |
| LAW | 530 | 001 | Criminal Law | Barbara Mcquade | 4.00 | 4.00 | 4.00 | A |
| LAW | 540 | 002 | Introduction to Constitutional Law | Evan Caminker | 4.00 | 4.00 | 4.00 | B+ |
| LAW | 594 | 004 | Legal Practice Skills II | Mark Osbeck he-him-his | 2.00 | | 2.00 | H |
| LAW | 673 | 001 | Family Law | Tracy Van den Bergh | 3.00 | 3.00 | 3.00 | B+ |
| **Term Total** | | | | **GPA: 3.554** | **13.00** | **11.00** | **13.00** | |
| **Cumulative Total** | | | | **GPA: 3.734** | | **23.00** | **28.00** | |

Continued next page >

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# The University of Michigan Law School

## Cumulative Grade Report and Academic Record

**Name:** Metzger,Grayson M
**Student#:** 12834719

University Registrar

| Subject | Course Number | Section Number | Course Title | Instructor | Load Hours | Graded Hours | Credit Towards Program | Grade |
|---|---|---|---|---|---|---|---|---|
| **Fall 2022** | **(August 29, 2022 To December 16, 2022)** | | | | | | | |
| LAW | 536 | 001 | Nat'l Security & Civ Liberties | Barbara Mcquade | 3.00 | 3.00 | 3.00 | B+ |
| LAW | 669 | 002 | Evidence | David Moran | 3.00 | 3.00 | 3.00 | A- |
| LAW | 978 | 001 | Veterans Legal Clinic | Matthew Andres | 4.00 | 4.00 | 4.00 | A |
| LAW | 979 | 001 | Veterans Legal Clinic Seminar | Carrie Floyd<br>Matthew Andres<br>Carrie Floyd | 3.00 | 3.00 | 3.00 | A- |
| **Term Total** | | | | **GPA: 3.700** | **13.00** | **13.00** | **13.00** | |
| **Cumulative Total** | | | | **GPA: 3.722** | | **36.00** | **41.00** | |
| **Winter 2023** | **(January 11, 2023 To May 04, 2023)** | | | | | | | |
| LAW | 459 | 001 | Law&Hist:Econ Instit of Capit | Veronica Santarosa | 2.00 | 2.00 | 2.00 | A |
| LAW | 569 | 001 | Legislation and Regulation | Daniel Deacon | 4.00 | 4.00 | 4.00 | B+ |
| LAW | 641 | 001 | Crim Just: Invest&Police Prac | Ekow Yankah | 4.00 | 4.00 | 4.00 | A+ |
| LAW | 730 | 001 | Appellate Advoc:Skills & Pract | Evan Caminker | 4.00 | 4.00 | 4.00 | A+ |
| **Term Total** | | | | **GPA: 3.971** | **14.00** | **14.00** | **14.00** | |
| **Cumulative Total** | | | | **GPA: 3.792** | | **50.00** | **55.00** | |
| **Fall 2023** | **(August 28, 2023 To December 15, 2023)** | | | | | | | |
| Elections as of: | 05/30/2023 | | | | | | | |
| LAW | 443 | 001 | Theoretical Persp on Crim Proc | Gabe Mendlow | 2.00 | | | |
| LAW | 480 | 001 | MDefenders<br>Public Defender Training Institute (Part I) | Eve Primus | 2.00 | | | |
| LAW | 642 | 001 | Mass Incarceration | Roscoe Jones Jr | 1.00 | | | |
| LAW | 677 | 001 | Federal Courts | Gil Seinfeld | 4.00 | | | |
| LAW | 681 | 001 | First Amendment | Don Herzog | 4.00 | | | |

This transcript is printed on special security paper with a blue background and the seal of the University of Michigan. A raised seal is not required.

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Control No: E196663901 Issue Date: 05/30/2023 Page 3

# The University of Michigan Law School

## Cumulative Grade Report and Academic Record

**Name:** Metzger,Grayson M
**Student#:** 12834719

University Registrar

End of Transcript
Total Number of Pages 3

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A BLACK AND WHITE TRANSCRIPT IS NOT AN ORIGINAL

# University of Michigan Law School Grading System

## Honor Points or Definitions

| Through Winter Term 1993 | | Beginning Summer Term 1993 | |
|---|---|---|---|
| A+ | 4.5 | A+ | 4.3 |
| A | 4.0 | A | 4.0 |
| B+ | 3.5 | A- | 3.7 |
| B | 3.0 | B+ | 3.3 |
| C+ | 2.5 | B | 3.0 |
| C | 2.0 | B- | 2.7 |
| D+ | 1.5 | C+ | 2.3 |
| D | 1.0 | C | 2.0 |
| E | 0 | C- | 1.7 |
| | | D+ | 1.3 |
| | | D | 1.0 |
| | | E | 0 |

**Other Grades:**

F Fail.

H Top 15% of students in the Legal Practice courses for students who matriculated from Spring/Summer 1996 through Fall 2003. Top 20% of students in the Legal Practice courses for students who matriculated in Spring/Summer 2004 and thereafter. For students who matriculated from Spring/Summer 2005 through Fall 2015, "H" is not an option for LAW 592 Legal Practice Skills.

I Incomplete.

P Pass when student has elected the limited grade option.*

PS Pass.

S Pass when course is required to be graded on a limited grade basis or, beginning Summer 1993, when a student chooses to take a non-law course on a limited grade basis.* For SJD students who matriculated in Fall 2016 and thereafter, "S" represents satisfactory progress in the SJD program. (Grades not assigned for LAW 970 SJD Research prior to Fall 2016.)

T Mandatory pass when student is transferring to U of M Law School.

W Withdrew from course.

Y Final grade has not been assigned.

* A student who earns a grade equivalent to C or better is given a P or S, except that in clinical courses beginning in the Fall Term 1993 a student must earn a grade equivalent to a C+ or better to be given the S.

MACL Program: HP (High Pass), PS (Pass), LP (Low Pass), F (Fail)

Non-Law Courses: Grades for these courses are not factored into the grade point average of law students. Most programs have customary grades such as A, A-, B+, etc. The School of Business Administration, however, uses the following guides: EX (Excellent), GD (Good), PS (Pass), LP (Low Pass) and F (Fail).

## Third Party Recipients

As a third party recipient of this transcript, you, your agents or employees are obligated by the Family Rights and Privacy Act of 1974 not to release this information to any other third party without the written consent of the student named on this Cumulative Grade Report and Academic Record.

## Official Copies

An official copy of a student's University of Michigan Law School Cumulative Grade Report and Academic Record is printed on a special security paper with a blue background and the seal of the University of Michigan. A raised seal is not required. A black and white is not an original. Any alteration or modification of this record or any copy thereof may constitute a felony and/or lead to student disciplinary sanctions.

The work reported on the reverse side of this transcript reflects work undertaken for credit as a University of Michigan law student. If the student attended other schools or colleges at the University of Michigan, a separate transcript may be requested from the University of Michigan, Office of the Registrar, Ann Arbor, Michigan 48109-1382.

Any questions concerning this transcript should be addressed to:

Office of Student Records
University of Michigan Law School
625 South State Street
Ann Arbor, Michigan 48109-1215
(734) 763-6499

UNIVERSITY OF MICHIGAN LAW
625 South State Street
Ann Arbor, MI 48109

EVAN H. CAMINKER
Dean Emeritus & Branch Rickey Collegiate Professor of Law

June 05, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I heartily support Grayson Metzger's candidacy for a judicial clerkship. I'm confident she will be an excellent law clerk and a welcome addition to your chambers.

I have taught Grayson in two classes, a first-year Constitutional Law course (in which she earned a B+) and an upper-division Appellate Advocacy course (in which she earned a quite-rare A+). Grayson was a joy in both courses, being a thoughtful and dependable contributor to class discussions. She regularly asked very smart and on-point questions and offered provocative insights on both doctrinal and broader analytical approaches and analogies. As just one example, in Constitutional Law Grayson posited a hypothetical congressional statute that prohibited States from using the colors red, white, and blue in their official state flags. Such a statute arguably serves a legitimate federal interest in protecting the distinctiveness of the national flag; it does not "commandeer" affirmative state conduct as traditionally defined in the Supreme Court's anti-commandeering doctrine; it does not preempt any power traditionally reserved to the states as defined by subject matter; and yet it seems quite dismissive of basic principles of state sovereignty and dignity. The hypo generated a far-reaching conversation about both the propriety and challenges of invoking nontextual values in constitutional adjudication and about the substance of any such constitutional values. This was a repeated pattern: Grayson had a knack for coming up with a question or comment that helpfully illuminated or tested complicated legal concepts or doctrines.

I worked with Grayson more closely and extensively in Appellate Advocacy. This course involves an extremely rigorous and intense simulation exercise focusing on federal appellate practice. Each student prepared three long briefs (changing sides midstream) and delivered three oral arguments regarding a manufactured hypothetical involving a criminal prosecution of former President Donald Trump based on his January 6 rally. To successfully navigate the course, a student had to develop a wide range of skills, with an emphasis on sophisticated fact-based legal reasoning and nuanced approaches to persuasive communication. Grayson was a leading contributor to class discussions, and her ability to construct creative and coherent legal arguments continued to impress me. As reflected in the A+ grade, her briefs were impressively well argued and tightly crafted. But what stood out most for purposes of this reference was the effort Grayson put into learning how best to carefully read and mine the record to prompt questions that in turn can drive more nuanced legal analyses. Frankly (and disappointingly), many law students want to opine about legal principles in the abstract and have no patience for the stubborn facts. By contrast, Grayson grounded her legal argumentation in reality and maintained a healthy focus on the factual record — an obviously necessary inclination for an effective law clerk.

Grayson is a delightful young woman. She is poised and self-confident, while at the same time being a bit self-effacing. Both liked and appreciated by her peers, Grayson is warm, engaging, and amiable; I'm completely confident she'll wear extremely well in the context of a busy and high-pressure work environment.

In the near term, Grayson plans to work as a trial-level public defender in a state system. I myself can easily see her doing appellate level work in the longer term. I suspect she'll create many opportunities for herself once she demonstrates her impressive lawyering skills. Wherever her path takes her, I'm confident she'll end up making her mentors quite proud.

In sum, Grayson would be an excellent addition to your chambers. I enthusiastically recommend her for this position.

Sincerely,

Evan H. Caminker

Evan Caminker - caminker@umich.edu - 734-764-5221


May 23, 2023

Your Honor:

I am thrilled to recommend Grayson Metzger for a clerkship in your chambers. I had the pleasure of teaching Grayson in the University of Michigan Law School's Veterans Legal Clinic (VLC) during the fall semester of 2022. Grayson zealously advocated on behalf of her clients, demonstrating her legal acuity, ability to take initiative with little direction, and her dedication to her clients. She was an outstanding student attorney in the VLC; I am confident that she will be a devoted and exceptional clerk in your chambers.

Because I work closely with the VLC's students, I have gotten to know Grayson and her work well. The VLC provides free, direct representation to veterans in all types of civil legal aid matters, including housing, consumer, and family law cases, among others. Students are required to quickly learn unfamiliar law while balancing several cases at once and while providing high-quality legal representation. Students act as the "lead" attorneys in the cases, conducting client interviews, researching relevant legal issues, drafting pleadings, motions, and discovery, and preparing for and conducting hearings. As the supervising attorney, I review all written documents, attend all court appearances, and meet frequently with students to discuss strategic decisions to ensure high quality representation and to provide feedback on students' performance. While I review everything the students do, the students are expected to work independently, to manage and maintain relationships with their clients, the opposing counsel and the courts, and to make the strategic decisions in their cases.

Grayson has been an outstanding clinic student; she has demonstrated that she has the talent, skills, and demeanor to be an excellent judicial clerk. In one of her primary cases in the VLC, Grayson represented a client living in a subsidized housing unit in a wrongful termination of tenancy action. Grayson drafted numerous motions and pleadings in the matter, including a motion for summary disposition, a trial brief, and jury instructions. Her written work was well-drafted, polished, and persuasive. I was particularly impressed with her ability to craft accessible, well thought-out, jury instructions on a novel and untested theory of subsidized housing law. While Grayson was ultimately unable to argue the merits of her proposed jury instructions because the court adjourned the hearing, she was prepared to argue the merits and even volunteered in the clinic after her semester ended to appear at the hearing. Grayson is an excellent writer who takes great pride in her work, and I am confident she will be a strong addition to your chambers.

Not only has Grayson excelled in her written work while in the VLC, but she has adeptly represented clients under intense time pressures. In one of the clinic's larger cases – a real estate fraud case – Grayson conducted the initial interview and fact investigation for the case immediately after the client contacted the clinic. After a careful review of the client's documents, Grayson realized that the client's contract contained a one-year statute of limitations, which was

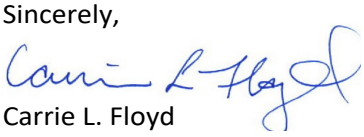
701 S. State Street
Ann Arbor MI 48109-3091 USA
MAIN: 734 763-2798 FAX: 734-764-0061

set to run four weeks after her initial interview. Grayson quickly investigated the facts of the client's dispute, conducted significant legal research to identify his claims, and skillfully drafted a compelling and well-pled, seven-count complaint all before the statute of limitations ran. Despite time pressures, Grayson was able to swiftly pivot to meet the pressing needs of the client while providing high-quality legal representation.

While Grayson's legal skills were superb, I was most impressed by her dedication and devotion to her clients. Because most of the VLC's clients are indigent, many lack transportation, internet access, and access to many basic necessities. Grayson frequently identified additional social supports and resources for her clients, while working collaboratively with the VLC's social work student to provide holistic representation. She also took additional time to meet in-person with her clients when they could not meet at the Law School or virtually. Grayson's dedication to her clients allowed her to not only address her client's pressing legal issues, but to help them access much needed social service resources. Her unique ability to empathize and to connect with clients in crisis will make her a compassionate and skillful lawyer who is able to creatively problem solve.

Grayson is a pleasure to work with. She is smart, collegial, and devoted to her work, her clients, and her colleagues. She played an integral part in building the community of the VLC last semester; she was a continuous support to her colleagues. In short, I am confident that Grayson will be an excellent judicial clerk and a strong addition to your chambers. I wholeheartedly recommend Grayson for a position within your chambers, and I would be happy to answer any other questions you may have about Grayson and her outstanding qualifications. Please feel free to contact me anytime at 734-763-7211 or by email at cfloyd@umich.edu.

Sincerely,



Carrie L. Floyd
Clinical Teaching Fellow
Veterans Legal Clinic

# Grayson Metzger

(443) 977-0412 • gmmetzge@umich.edu • she/her/hers


This writing sample is an excerpt from an appellate brief prepared for an appellate advocacy practicum. We were given a mock indictment and a closed universe of cases to answer the question of whether a former President could be criminally prosecuted for his conduct while in office.

This writing sample is my own work. I made several minor edits based on feedback from my professor at the end of the term.

## Argument

### I. President Trump may not be indicted under the obstruction and incitement statutes because a sitting President is not subject to criminal laws punishing "whoever" engages in the proscribed conduct.

The federal obstruction and incitement statutes do not explicitly define "whoever," and substantive principles of statutory interpretation favor exclusion of a sitting President. Donald Trump may not be indicted under these statutes for actions taken while he was the sitting President for three reasons. First, the plain meaning of "whoever" is ambiguous with respect to the President. *See* 18 U.S.C. § 1512(c)(2)(Obstructing an Official Proceeding); 18 U.S.C. § 2101 (Inciting a Riot). Second, the Court may fairly avoid a serious separation of powers question by construing "whoever" to exclude the President. Lastly, Congress has not expressly applied these criminal statutes to the President, and thus the presidential clear statement rule precludes application to President Trump's alleged conduct.

#### A. The plain meaning of "whoever" in the obstruction and incitement statutes is ambiguous.

Congress does not define the term "whoever" in either statute charged in the indictment, although it does precisely define other elements of each offense. The obstruction statute applies to "whoever corruptly" obstructs or influences an official proceeding. 18 U.S.C. § 1512(c)(2). "Official proceeding" is statutorily defined as "a proceeding before Congress" or other specified body; "corruptly" means "acting with improper purpose, purposely or by influencing another." 18 U.S.C § 1515. The indictment extensively cites case law to define "obstructive act," "nexus to a[n] . . . official proceeding," "improper purpose," and "corrupt means." R.1: Indictment 101, 127. Yet, the indictment neglects to define "whoever" by reference to statute or case law. Similarly, the incitement statute establishes criminal penalties for "whoever travels in interstate or foreign commerce" to incite, organize, promote, or participate in a riot. 18 U.S.C. § 2101.

Both "riot" and "to incite a riot" are defined by statute, but the indictment fails to define "whoever." 18 U.S.C. § 2102.

The dictionary defines "whoever" as "whatever person; no matter who," suggesting a broad meaning of the word. Merriam-Webster, https://www.merriam-webster.com/dictionary/whoever. However, words of such broad reach are often implicitly narrowed by context in their colloquial usage. If a person announces to her friends "whoever doesn't have Thanksgiving plans is invited to my house," one would not assume that she would welcome a passerby who overheard the statement into her home on Thanksgiving Day. Congress also appreciates the ambiguity inherent in words of broad meaning. Indeed, presumably responding to confusion about whether "person" and "whoever" encompass nonperson entities, Congress has clarified that both terms include "corporations, companies, associations . . . as well as individuals." 1 U.S.C. § 1.

"Whoever" could be characterized either as a term of art or generic drafting language. It is used throughout the federal code—in the obstruction and incitement statutes at issue here, in the kidnapping statute, 18 U.S.C. § 1201 ("whoever unlawfully seizes . . ."), in the bribery statute, 18 U.S.C. § 201 ("whoever, being a public official), and in countless others. Congress may desire to proscribe specific conduct for all persons when it uses "whoever" in criminal statutes. Nevertheless, Congress is aware that the population who may ultimately be penalized for such conduct is limited by legal immunities, affirmative defenses, and determinations of competency to stand trial. For example, "whoever" applies to a person who participates in a riot, but it would not apply to that same person if the prosecutor offers him immunity to testify against the person who planned the event and provided weapons to attendees. 18 U.S.C. 2101. The meaning of "whoever" is context dependent, and thus the Court's statutory analysis cannot end with plain meaning.

### B. This Court can avoid a serious separation of powers question because it is fairly possible to interpret "whoever" in the obstruction and incitement statutes to exclude a sitting President.

"Whoever" does not unambiguously include the President and the canon of constitutional avoidance counsels against inclusion as well. This canon derives from the "cardinal principle" that the Court must consider whether there is a "fairly possible" construction of a statute that allows the Court to avoid questions raising a "serious doubt of constitutionality." *Public Citizen*, 491 U.S. 440, 465–66 (1989) (quoting *Crowell v. Benson*, 285 U.S. 22 (1932). The Court applies the avoidance canon most strictly where the constitutional question relates to the separation of powers. *See Public Citizen*, at 466.

The constitutional avoidance canon is triggered by the question of whether the term "whoever" in the obstruction and incitement statutes includes a sitting President. First, subjecting a President to criminal liability for conduct while in office raises separation of powers concerns similar to those addressed in the context of civil damages liability. *See Nixon v. Fitzgerald*, 457 U.S. 731 (1982); *Clinton v. Jones*, 520 U.S. 681 (1997). Second, it is fairly possible for the Court to interpret "whoever"—an ambiguous term—to implicitly exclude the President.

#### 1. Including the sitting President in the obstruction and incitement statutes seriously threatens to infringe on the performance of his constitutional duties.

When Congress makes laws that intrude on executive power and limit the President's ability to perform his constitutional duties, the Court conducts a constitutional analysis. There are two possible paths of inquiry. First, where the power at issue is core to the presidency and explicitly constitutionally delegated to the President, the Court refuses to tolerate any intrusion by Congress. *Public Citizen*, 491 U.S. 440, 485 (1989) (Kennedy, J. concurring). *See also United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872). Alternatively, where the power is not enumerated, but rather derived from the President's general executive power, the Court conducts a balancing

test to determine whether congressional interests in encroaching on presidential power outweigh the burden on the President. *Fitzgerald*, at 754.

Here, the obstruction and incitement statutes facially threaten to unduly burden presidential functions. Congress has the power to make laws, and it has an interest in people following these laws. U.S. Const. Art. I, § 1; § 8, cl. 18. Specifically, the obstruction statute protects the sanctity of congressional proceedings from corrupt influence, *see* 18 U.S.C. § 1512(c)(2), and the incitement statute deters and punishes mob violence. *See* 18 U.S.C. § 2101. However, applying these statutes to the President potentially infringes on core presidential powers. Hypothetically, a President could be charged with inciting a riot for validly exercising his Commander-in-Chief power by speaking to troops before a military operation. Art. II, § 2, cl. 1. The President could also be charged with obstruction of an official proceeding for validly exercising his power to adjourn Congress. Art. II, § 2, cl. 3.

Although a conflict between the obstruction or incitement statutes and the President's core powers is imaginable, the facts of this case more likely deal with encroachment on the President's general executive power. The President frequently addresses the public, and the ability to communicate with the public naturally follows from the Vesting and Take Care clauses. Art. II, §§ 1, 3. The Office of Legal Counsel recognizes that the President's official role includes explaining, advocating, and defending policies. Office of Legal Counsel, Payment of Expenses Associated with Travel by the President and Vice President (Mar. 24, 1982). Also, in *Carroll v. Trump*, the district court conceded that presidential remarks about policies and elections are related to executive functions because they "alert the public about what the government is up to." 2020 WL 6277814 at 8 (S.D.N.Y. 2020). *Cf. Wuterich v. Murtha*, 562 F.3d 375, 384 (2009) (legislator's ability to do his job is tied to his relationship with the public and colleagues in Congress).

President Trump's actions on January 6, 2021 are well within this realm of general executive power, but the government alleges these acts are criminal because of his intent. The indictment alleges that President Trump spoke to a crowd of his supporters on the Ellipse and tweeted about the electoral count and potential election fraud. R.1: Indictment 101, 110–11. These remarks allegedly coincided with an attack on the Capitol building that forced Congress to stop the electoral count. *Id.*, at 111, 122. President Trump can be convicted for inciting a riot only if the government can show that Trump's actions proximately caused a crowd of people to forcibly enter the Capitol, and that his words were "directed to inciting or producing imminent lawless action." *Id.*, at 129 (quoting Brandenburg v. Ohio, 395 U.S. 444 (1969)). Likewise, President Trump can be convicted for obstruction only if the government can prove that Trump acted "corruptly." Consequently, the intent elements of the obstruction and incitement statutes call into question the otherwise legitimate exercise of the President's executive authority.

The Court can resolve this tension by weighing the congressional interests in the obstruction and incitement statutes against the burden on the executive, but this balancing test is precisely the constitutional analysis the avoidance canon seeks to bypass. *See Public Citizen*, 491 U.S. 440, 482 (Kennedy, J. concurrence) (rejecting the majority's statutory interpretation for lack of a "fairly possible" alternative interpretation of "utilize" and proceeds to the separation of powers balancing test). *See also Fitzgerald*, at 748 n.27 (Court forced to decide the constitutional issue because the lower court had assumed a cause of action against the President).

Applying the obstruction and incitement statutes to the sitting President raises not just a doubt of constitutionality, but a *serious* doubt. In these particular circumstances, the statutes impede the President's ability to speak freely to his constituency. A finding of criminal liability here rests on whether President Trump's rhetoric is considered incendiary or hyperbolic, meant to be taken literally or figuratively. Finding that the President's broad range of discretionary

responsibility could make inquiry into his motives "highly intrusive," the *Fitzgerald* court held that only civil damages immunity for conduct within the outer perimeter of the President's duties could sufficiently minimize the burden on the executive branch. *Fitzgerald*, at 756–57. Here, the subjective inquiry required by both the obstruction and incitement statutes is also highly intrusive, compelling the Court to reach the constitutional analysis.

The serious doubt is not eliminated if, *arguendo*, the Court immunizes the President from criminal liability for official acts but finds that President Trump's conduct was unofficial. First, the line between official and unofficial conduct is inherently blurred. The Office of Legal Counsel has recognized that "it is simply not possible to divide many of the actions of the President . . . into utterly official or purely political categories." OLC Expenses Memo, at 1. The *Fitzgerald* court also recognized the difficulty in delineating "which of the President's innumerable 'functions' encompassed a particular action," and thus extended immunity to the outer perimeter of official conduct. *Fitzgerald*, at 756. The facts at hand thicken the haze. The government will surely argue that President Trump acted in an unofficial capacity when he advocated for his political supporters to interfere with the electoral count at the Capitol. But the facts alleged in the indictment just as plausibly depict a President giving a speech encouraging the crowd to exercise their constitutional right to protest.

If courts and the executive branch view the line between official and unofficial conduct as blurry, the President might be concerned how others perceive actions he genuinely believes are official. Consequently, a President could avoid official conduct for fear that the Department of Justice or a jury might consider those actions unofficial, resulting in the President's exposure to criminal liability and the potential loss of personal liberty. Hesitation under these circumstances would frustrate the purpose of immunity for official conduct. *Cf. Fitzgerald*, at 756 (rejecting a functional approach to presidential immunity because inquiry into the

President's motives would "deprive immunity of its intended effect"). Thus, a serious doubt of constitutionality is raised if either unofficial or official presidential conduct is covered by the obstruction and incitement statutes, and the Court should avoid including the President if there is a fairly possible alternative construction of these statutes.

**2. It is fairly possible to exclude the President from the term "whoever" in these statutes.**

The Court may avoid constitutional questions only where an alternative interpretation of the statute is "fairly possible" or "otherwise acceptable." *Public Citizen*, at 465–66. Interpreting "whoever" to exclude the President is fairly possible because the word is ambiguous, exclusion would be consistent with the purposes of existing immunity, and Congress can amend statutes as needed.

First, "whoever" is an ambiguous term frequently used in criminal statutes. *See supra* Section I.A. Although Congress plausibly intends to deter all persons from engaging in particular conduct when it uses the word "whoever," the word does not definitively capture who may be punished for such conduct. Various immunities (diplomatic, witness), affirmative defenses (insanity, necessity), and competency evaluations limit who may be punished for acts Congress has criminally proscribed. The Court has previously found that ambiguity in a statutory term invites alternative interpretations where a constitutional issue is at stake. In *Franklin v. Massachusetts*, for example, the Court considered whether to include the President in the term "agency," which would have allowed judicial review of his actions under the Administrative Procedure Act. 505 U.S. 788 (1992). In finding that inclusion would violate the separation of powers, the Court added the President to a list of exclusions already expressly listed in the APA. *Id.* at 800. In *Public Citizen*, the Court promptly invoked the constitutional avoidance canon after finding that an unqualified reading of the word "utilize" would lead to absurd results. 491 U.S. 440, 452–55. The term "whoever" analogously invites alternative interpretations.